IN THE

Supreme Court of the United States

October Term, 1944

No. .....

GLICK BROTHERS LUMBER COMPANY, a California Corporation, MAX GLICK, OSCAR GLICK, ADOLPH GLICK, DAVID GLICK, ISRAEL GLICK and LABEL GLICK and doing business as Glick Brothers Lumber Company,

Petitioners,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

The Exploratory Searches and Seizures by the Office of Price Administration Without Process or Pretended Process and Over Objections Violated Petitioners' Rights Under the Fourth and Fifth Amendments to the Constitution of the United States.

Upon the basis of the evidence before it of the exploratory search of two investigating officers without any complaint or pretended complaint, neither they nor anyone connected with the Government had a right to seize any papers from the private vaults of the defendants and clandestinely take them to the Office of Price Administration

for photostating. It is respectfully submitted that this search and seizure was illegal. The Fourth and Fifth Amendments cover not only searches but seizures.

Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746;

Takahashi v. United States, 143 Fed. (2d) 118.

The constitutional guarantees of the Fourth Amendment apply equally to corporations. Explanatory searches are unauthorized.

Go-Bart Importing Company v. United States, 282 U. S. 374, 75 L. Ed. 344;

Guckenheimer & Bros. Co. v. United States, 3 Fed. (2d) 786;

Nathanson v. United States, 290 U. S. 41, 78 L. Ed. 159;

Silverthorne Lumber Co. v. United States, 254 U. S. 385-390, 64 L. Ed. 319;

Hale v. Henkel, 201 U. S. 43, 50 L. Ed. 652.

Both searches and seizures of individual papers are forbidden.

Weeks v. United States, 232 U. S. 383.

In *Goldman v. United States,* 86 L. Ed. 1330, there is the following footnote:

"4. Papers taken from an office in the course of an unreasonable search are taken in violation of the Fourth Amendment. Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. Ed. 319, 40 S. Ct. 182, 24 ALR 1426; Gouled v. United States, 255 U. S. 298; 65 L. Ed. 647, 41 S. Ct. 261; Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L.

Ed. 374, 51 S. Ct. 153; United States v. Lefkowitz, 285 U. S. 452, 76 L. Ed. 877, 52 S. Ct. 420, 82 ALR 775."

At page 1328:

"Mr. Justice Murphy says:

"One of the great boons secured to the inhabitants of this country by the Bill of Rights is the right of personal privacy guaranteed by the Fourth Amendment. In numerous ways the law protects the individual against unwarranted intrusions by others into his private affairs."

At page 1329:

"But the Fourth Amendment puts a restraint on the arm of the Government itself and prevents it from invading the sanctity of a man's home or his private quarters in a chase for a suspect except under safeguards calculated to prevent oppression and abuse of authority.

On the value of the right to privacy, as dear as any to free men, little can nor need be added to what was said in Entick v. Carrington, 19 How. St. Tr. (Eng.) 1030, Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 S. Ct. 524, and Justice Brandeis' memorable dissent in Olmstead v. United States, 277 U. S. 438, 471, 72 L. Ed. 944, 953, 48 S. Ct. 564, 66 ALR 376. Suffice it to say that the spiritual freedom of the individual depends in no small measure upon the preservation of that right. Insistence on its retention does not mean that a person has anything to conceal, but means rather that the choice should be his as to what he wishes to reveal, saving only to the Government the right to seek out crime under a procedure with suitable safeguards for the

protection of individual rights, such as the warrant whose requisites are set forth in the Fourth Amendment."

In *Federal Trade Com. v. American Tobacco Co.*, 264 U. S. 306, 68 L. Ed. 700, 701, it was held as follows:

> **"Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."**

In *Feldman v. United States,* decided May 29, 1944, No. 193 October Term, 1943, the court said:

> *"We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases of the same constitutional purpose, to maintain inviolate large areas of personal privacy. . . .*
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> *"But for more than one hundred years, ever since Barron v. Baltimore,* 7 Pet. 243, *one of the settled principles of our Constitution has been that these Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit. Brown v. Walker,* 161 U. S. 591, 606; *Jack v. Kansas,* 199 U. S. 372, 380; *Twining v. New Jersey,* 211 U. S. 78. . . .
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> *"The Constitution prohibits an invasion of privacy only in proceedings over which the Government has control."*

Mr. Justice Black, in his dissenting opinion, said:

"In *Boyd v. United States*, this Court said that 'any compulsory discovery by extorting the party's oath . . . is contrary to the principles of a free government. It is abhorrent . . . to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.' 116 U. S. 616, 631-632. Unless the Court is now disavowing this belief, the use of testimony obtained by compulsory discovery to convict an accused must be considered 'shocking to the universal sense of justice' and 'offensive to the common and fundamental ideas of fairness and right,' and therefore, under past decisions of the Court, incompatible with Constitutional due process of law. *Betts v. Grady*, 316 U. S. 455, 462, 473. Or at least, even if the use of testimony extracted by compulsory discovery be held consistent with due process, adherence to the belief expressed by the *Boyd* case should require the Court to hold that, absent a conflicting Act of Congress, 'a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence' so obtained. *McNabb v. United States*, 318 U. S. 332, 347. But I do not base my dissent upon judicially defined concepts of procedural due process or upon judge-made rules of evidence. . . .

"As the Fifth Amendment heretofore has been interpreted, Feldman's testimony could not have been used for this purpose had it been compelled by a fed-

eral court rather than the state court.[1] This would have been true whether the federal court proceeding had been non-criminal or criminal,[2] and whether Feldman had testified as a mere witness or as a defendant."[3]

Statutes providing for such searches are violation of the Fourth and Fifth Amendment.

Boyd v. United States, 116 U. S. 616.

There is nothing in the Congressional history or in the Act itself that shows any intent to evade or avoid or prevent the constitutional guaranty. On the contrary, the presumption is that Congress intended that the Constitution should be followed in all its provisions as a part of the Act. The Congress clearly indicated this intention in providing for the power of subpoena and *lawful process* for the purpose of securing books, papers, and records. It provided for a constitutional guaranty of claiming the privilege in respect to any investigation. Such claim of privilege necessarily connoted that there be process of subpoena and an opportunity to claim the privilege—an opportunity which is non-existent if officers without any process or pretended process can, on a roving commission, seize any books or papers they may select, fail to give any receipt for them, take them to the Office of the Office of Price Administration, or keep them

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[1]*McCarthy v. Arndstein,* 266 U. S. 34; and see *Bram v. United States,* 168 U. S. 532; *Wan v. United States,* 266 U. S. 1; *cf. Boyd v. United States,* 116 U. S. 616.

[2]*McCarthy v. Arndstein, supra,* Note 2, pp. 40-41; *Counselman v. Hitchcock,* 142 U. S. 547, 562. See also *United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149; *United States ex rel. Vajtauer v. Comm'r. of Immigation,* 273 U. S. 103.

[3]*Counselman v. Hitchcock,* 142 U. S. 547.

or return them, as they see fit. Surely this was not the purpose of Congress.

The Congress also showed its clear intent in providing in the Act for the right of counsel and for an opportunity to have the statements of any witnesses taken down by a shorthand reporter. The Congressional history is further implemented by:

(a) An investigation of the Select Committee to investigate Executive Agencies, House of Representatives, 78th Congress, 2nd Session, appointed pursuant to House Resolution 102 to investigate Executive Agencies.

(b) House of Representatives Report No. 102, Part 3, dated June 1, 22nd, 1944 to investigate executive agencies, where Attorney Fleming J. James, Jr., Chief Government Officer for the Office of Price Administration, who appeared before this Court, and the Select Committee to Investigate Executive Agencies.[1] Congress questioned

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[1]This court's attention is respectfully called to the testimony given by Attorney Fleming James, Jr., Chief Enforcement Counsel for the Office of Price Administration, before the congressional investigating committee of executive agencies. Mr. James was asked why the O.P.A. was sending out subpoenas in blank and the authority of the O.P.A. to do so.

Nowhere in his testimony before Congress did James contend that the records sought by the O.P.A. were quasi-public, and that subpoenas or process were unnecessary, which would have been a complete defense to the questioning by Congress, for if records are quasi-public no subpoenas would in fact be necessary and none would have to be sent out to the different departments throughout the country in blank. Mr. James conceded that the O.P.A. could get things from the courts which Congress would not give to them.

In House of Representatives Report 102, Part 3, June 1, 22, 1944, to investigate executive agencies, Mr. James said:

> "You never can tell what will happen if you put the thing directly up to Congress, I suppose. (P. 2435.) . . . So far as the wisdom of a course of action is concerned, a situation may very well arise where you have language that you

Mr. James as to why the Office of Price Administration was sending out subpoenaes in blank and the authority of the Office of Price Administration to do so. Nowhere

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feel supports what you are doing and which was intended that way at the time when it was enacted, and that you feel you might get an entirely different result at a later time when the temper of things is changed.

Mr. Ford: What do you mean 'temper of things'?

Mr. James: If the attitude of Congress toward the agency changed, or something like that. That isn't a thing considered in this case.

Mr. Ford: What you really mean is the temper of the courts, don't you?

Mr. James: No; I didn't mean that, sir.

Mr. Ford: You didn't?

Mr. James: No.

Mr. Ford: I didn't exactly understand what you meant.

Mr. James: What I meant was simply that if you asked for a clarifying amendment later, you might not get it even though Congress would have originally enacted it at the time it was passed."

He further conceded that the subpoena would have to be limited and would have to specify the books and papers pertinent and necessary.

"Mr. Hartley: Just how broad is this authority? Will you state for the record exactly what authority this is to these local administrators all over the United States? How far-reaching is that authority? What can they do under it?

Mr. James: They can do just what the Administrator did before. That is, the facts must be laid before them as to why a subpoena is sought and the terms of the subpoena are laid before them and they determine whether in their discretion a subpoena should issue, and if they determine that it should, they sign and issue it.

Mr. Hartley: And how broad would the subpoena be?

Mr. James: The subpoena has to be specific. That is the requirement.

Mr. Hartley: What may it include?

Mr. James: Well, it may include papers, books, and invoices relating to certain specific transactions between certain specific dates.

"Well, it is hard to answer the questions in the abstract." (P. 2432.)

in his testimony before Congress did Mr. James contend that the records sought by the Office of Price Administration were *quasi*-public, which would have been a com-

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Mr. James: Yes; I think the Administrator has the legal authority to delegate it to him, but this is true: The subpoena power has been very carefully preserved in the administrative part of the agency and not given to the enforcement part of the agency. As I say, there has been no essential change. This order works no essential change, and that is why I didn't give it the serious consideration that I perhaps should have as to the various ways of doing it.

There certainly isn't any tradition or any predisposition to grant the subpoena power to the enforcement side of the agency, and I know that it won't be done.

Mr. Hartley: But in your interpretation of the act, and if this authority is correct, Mr. Bowles would have the authority to let Mr. Polier issue subpoenas?

Mr. James: Yes; he has the authority to make what would be an unwise delegation, to be sure, just as that would be true under the delegation of any of his powers.

Mr. Hartley: I am glad you agree it would be an unwise delegation of authority.

Mr. James: I think it would be unwise only because I think it would be unwise to delegate the subpoena power to the Enforcement Department, to me, or to Mr. Emerson. I think it should be in the administrative side.

Mr. Hartley: Have you completely explained the extent to which the subpoena power can be used? Are you satisfied that you have?

Mr. James: Well, I think so, unless you have some specific question.

Mr. Hartley: I asked you to explain how broad this authority was in your opinion.

Mr. James: Yes.

Mr. Hartley: And I am asking you whether or not you have explained that for the record.

Mr. James: Well, I think so. The requirement is that a subpoena must be specific. It must contain a specific description of what is desired. The way that is usually made specific is that it described documents pertaining to certain named transactions, or with certain named people between certain given dates. That is the practice generally in connection with the subpoenas.

Mr. Hartley: Could it force a person to bring in his bankbooks?

plete defense to the questioning of Congress, for if records were *quasi*-public no subpoena would in fact be necessary and none would have to be sent to the different officers of the Office of Price Administration throughout the country in blank. Mr. James stated that the Office of Price Administration could get things from the Court which Congress would not give them.[2]

The Ninth Circuit Court of Appeals took the position that the Emergency Price Control Act, being a wartime measure, that its construction should be placed in a dif-

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Mr. James: Yes; I think so.

Mr. Harltey: His savings accounts?

Mr. James: You mean the records of his savings accounts?

Mr. Hartley: Yes; I mean his bank book which shows how much money he has in the bank and his checking account.

Mr. James: Yes; I think it could.

Now, of course, this subpoena, like any other subpoena, is subject to privilege, and if a man claims privilege, then if he still is compelled to testify, immunity is thereby granted to him from any criminal or penal liability arising out of the transactions about which he testifies. That is a fairly usual procedure." [Pp. 2437, 2438.)

This, of course, would be entirely unnecessary if records were quasi-public.

It follows that the contention here made in this court was never made to Congress. The investigation of the congressional committee was climaxed into the Act as amended, which not only re-emphasized the subpoena requirement, but also gave the person subpoenaed the right to have counsel and to have the testimony taken down.

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[2]It is respectfully submitted that it is for the District Court to find the facts in the case and not for the Circuit Court of Appeals to make different findings if the facts as found by the District Court are supported by circumstantial evidence.

ferent light and upon a different basis. However, this Court has said in several cases that

> "The Constitution of the United States is a law for rules and people, equally, in war and in peace."
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> *Ex Parte Milligan,* 4 Wall. 2, 120;
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> *Ex Parte Endo,* 89 L. Ed. 219;
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> *Thomas v. Collins,* 89 L. Ed. 340.

Never before in the history of the United States do we know of any litigant, either the Government or other litigants, being able to search and seize a person's place of business for the purpose of suing him civilly. Surely no private litigant, having the right to sue for treble damages, could go into a store and grab records for the purpose of bringing this type of action. Has the Government any more rights than private litigants for bringing the action under the O. P. A. law, and can the Government officers, by reason of their official position, do what private litigants can not do? The question calls for serious and sober reflection and reconsideration.

This Court has stated in its opinion that:

> "Nor in a civil action does illegality of the means by which evidence has been procured afford grounds for a Motion to Dismiss. The defenses which may be interposed by motion are confined to those enumerated in Rule 12-B."

This Court has evidently overlooked the fact that the civil action in form, it is penal in nature. Therefore, no matter how the cause of action might be disguised, or what terminology may be applied to it, whether civil, penal, criminal, or otherwise, the guarantees of the Fourth Amendment are equally applicable.

This Court has vidently overlooked the fact that the case of *Boyd v. United States,* 29 L. Ed. 746, was a civil case in which there was a suit to forfeit 35 cases of plate glass. The Court in its analysis of that case said:

> "It is our opinion therefore that a compulsory production of a man's private papers to establish a criminal charge against him, *or to forfeit his property,* is without the scope of the Fourth Amendment to the Constitution, in all cases which a search and seizure would be."

And the Court further said:

> "Now it is elementary knowledge that one cardinal rule of the Court of Chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power, but it cannot abide the pure atmosphere of political liberty and freedom."

The Court further points out:

> "Reverting then to the peculiar phraseology of this Act and to the information in the present case, which is founded on it, we have to deal with an Act which expressly excluded criminal proceedings from its operation, although embracing civil suits for penalties and forfeitures, and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings of the law from being obnoxious to the prohibitions

of either? We think not; we think they are within the spirit of both."

That the Fourth Amendment applies equally to actions civil in form, though penal in nature, has been decided a long time ago, (*Boyd v. United States*, 29 L. Ed. 746), and that it applies in civil actions has equally been decided. (*Rogers v. United States*, 97 Fed. (2d) 691.) In adopting the new rules of civil procedure, Congress did not intend and can not be presumed to have intended to eliminate the constitutional guarantees which are substantive rights of litigants.

The District Court acted correctly within its authority in suppressing the evidence and ordering its return. This is a power inherent in the District Court which has a control of its own officers and papers. (*Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652-7; *Go-Bart Importing Company v. United States*, 282 U. S. 374, 75 L. Ed. 344.)[3]

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[3]In *Go-Bart Importing Company v. United States*, the Court said:

"The United States attorney and the special agent in charge, as officers authorized to conduct such prosecution and having control and custody of the papers for that purpose are, in respect of the acts relating to such prosecution, alike subject to the proper exertion of the disciplinary powers of the court. And on the facts here shown it is plain that the district court had jurisdiction summarily to determine whether the evidence should be suppressed and the papers returned to the petitioners. Weeks v. United States, 232 U. S. 383, 398, 58 L. ed. 652, 657, L. R. A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177; Wise v. Henkel, 220 U. S. 556, 558, 55 L. ed. 581, 582, 31 S. Ct. 599; Silverthorne Lumber Co. v. United States, 254 U. S. 385, 390, 64 L. ed. 319, 321, 24 A. L. R. 1426, 40 S. Ct. 182; Cogen v. United States, 278 U. S. 221, 225, 73 L. ed. 275, 281, 49 S. Ct. 118; United States v. Mills (C. C.), 185 Fed. 318; United States v. McHie (D. C.), 194 Fed. 894, 898; United States v. Lydecker (D. C.), 275 Fed. 976, 980; United States v. Kraus (D. C.), 270 Fed. 578, 580. Cf. Applybe v. United States (C. C. A. 9th), 32 F. (2d) 874."

In *Jones v. Securities and Exchange Commission*, 298 U. S. 25, 26, 80 L. Ed. 1026, the Court said:

> "* * * Disassociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as 'a fishing expedition . . . for the chance that something discreditable might turn up.' (Ellis v. Interstate Commerce Commission, 237 U. S. 434, 445, 59 L. ed. 1036, 1041, 35 S. Ct. 645)—an undertaking which uniformly has met with judicial condemnation. *Re* Pacific R. Commission (C. C.), 12 Sawy. 559, 32 F. 241, 250; Kilbourn v. Thompson, 103 U. S. 168, 190, 192, 193, 195, 196, 26 L. ed. 377, 386-389; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 520; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 419, 53 L. ed. 253, 263, 29 S. Ct. 115; Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 305-307, 68 L. ed. 696, 700, 701, 44 S. Ct. 336, 32 A. L. R. 786.
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> "*Re* Pacific R. Commission involved the power of a congressional commission to investigate the private affairs, books and papers of officers and employees of certain corporations indebted to the government. That commission called before it the president of one of these corporations, required the production of private books and papers for inspection, and submitted interrogatories which the witness declined to answer. Acting under the statute, the commission sought a peremptory order from the circuit court to compel the witness to answer the interrogatories. The court, consisting of Mr. Justice Field, Circuit Judge Sawyer, and District Judge Sabin, denied the motion of the district attorney for the order and discharged the rule to show cause. Opinions were ren-

dered seriatim, the principal one by Justice Field. The authority of the commission was definitely denied. That decision has frequently been cited and approved by the court. Judge Sawyer, in the course of his opinion (at p. 263), after observing that a bill in equity seeking a discovery upon general, loose and vague allegations is styled 'a fishing bill,' and will, at once, be dismissed on that ground (Story, Eq. Pl., sec. 325), said: 'A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no resrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end.'

"The fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious. And, indeed, the fear itself has little of substance upon which to rest. The federal courts are open to the government; and the grand jury abides as the appropriate constitutional medium for the preliminary investigation of crime and the presentment of the accused for trial.

"The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its in-

ception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing to light. *Cf.* Byars v. United States, 273 U. S. 28, 29, 71 L. ed. 520, 522, 47 S. Ct. 248, and cases cited. If the action here of the commission be upheld, it follows that production and inspection may be enforced not only of books and private papers of the guilty, but those of the innocent as well, notwithstanding the proceeding for registration, so far as the power of the commission is concerned, has been brought to an end by the complete and legal withdrawal of the registration statement.

"Exercise of 'such a power would be more pernicious to the innocent than useful to the public,' and approval of it must be denied, if there were no other reason for denial, because, like an unlawful search for evidence, it falls upon the innocent as well as upon the guilty and unjustly confounds the two. Entick v. Carrington, 19 How. St. Tr. 1030, 1074—followed by this court in Boyd v. United States, 116 U. S. 616, 629, 630, 29 L. ed. 746, 747, 751, 6 S. Ct. 522. No one can read these two great opinions and the opinions in the Pacific R. Commission Case, from which the foregoing quotation is made, without perceiving how closely allied in principle are the three protective rights of the individual—that against compulsory self-accusation, that against unlawful searches and seizures, and that against unlawful inquisitorial investigations. They were among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640. Even the shortest step in the direction of curtailing one of these rights must be halted *in limine*, lest it serve as a precedent for further advances in the same direction or for wrongful invasions of the others."

The following cases are helpful:

U. S. v. Mounday, 208 F. 186;

U. S. v. Friedberg, 253 F. 313.

In *U. S. v. Premium & Butte,* 246 F. 185, the court said with reference to the Fourth and Fifth Amendments:

> "These constitutional provisions were designed to check great evils well known to the founders of this republic. They are as valuable and necessary in war as in peace, and to be respected in both. They are principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle. The duty of giving them 'force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws.'"

See, also:

U. S. v. Olmstead, 7 F. (2d) 760, 762;

U. S. v. 1013 Crates of Whiskey Bottles, 52 F. (2d) 49.

In the case of *Hale v. Henkel,* 201 U. S. 43, 50 L. Ed. 652, the court held that the Fourth Amendment applies to a subpoena *duces tecum* issued under an order of the court, where the subpoena is so broad as to constitute an unreasonable search or inquiry, and that this applies to corporations as well as individuals. This was repeated in the *Boyd* case.

There is no reason why a complaint for a penalty by the United States, based upon evidence unlawfully searched and seized, in violation of the Fourth and Fifth Amendments to the Constitution of the United States, should not be suppressed, no matter what the name of

the action might be. Any other holding would defy the principles of the Fourth and Fifth Amendments.[4]

In the case of *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, 657, the court held that upon a timely motion to suppress evidence secured in violation of the Fourth Amendment the motion should be granted.

Where, as here, the entire proceedings were based upon this unlawful search and seizure, the court was not only obliged to examine the facts and determine the same, but was obliged, upon finding the grounds to be supported by substantial evidence, to grant the motion to dismiss.

In the *Weeks* case, the court said:

> " 'While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd Case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum*, against which the person, be he individual or corporation, is entitled to protection.' If such a seizure under the authority of a warrant supposed to be legal, constitutes a violation of the constitutional protection, *a fortiori* does the attempt of an officer of the United States, the United States marshal, acting under color of his office, without even the sanction of a warrant, constitute an invasion by the 4th Amendment. . . .
>
> "The right of the court to deal with papers and documents in the possession of the district attorney

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[4]Actually there need be no case of any kind pending. Application may be made to suppress the evidence and return the same without it. See *Cogen v. U. S.*, 278 U. S. 221, 73 L. Ed. 275; *Go-Bart Importing Co. v. U. S.*, 282 U. S. 374, 75 L. Ed. 344.

and other officers of the court, and subject to its authority, was recognized in Wise v. Henkel, 220 U. S. 556, 55 L. ed. 581, 31 Sup. Ct. Rep. 599. That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts. 1 Bishop, Crim. Proc., sec. 210; Rex v. Barnett, 3 Car. & P. 600; Rex v. Kinsey, 7 Car. & P. 447; United States v. Mills, 185 Fed. 318; United States v. McHie, 104 Fed. 894, 898.

"We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused."

While the *Weeks* case was a criminal case, the procedure as set forth clearly shows that the court, having control of the papers and things, has the duty to suppress the evidence unlawfully secured in violation of the Fourth Amendment and return the same, regardless of whether they were secured by a search warrant, a subpoena *duces tecum*, or without any process or pretended process, by officers of the United States.

In *Hale v. Henkel*, 201 U. S. 43, 50 L. Ed. 652, the court held that a subpoena *duces tecum* requiring a corporation to produce all its contracts and correspondence was unreasonable under the Fourth Amendment to the Constitution of the United States.

In *Go-Bart Importing Co. v. United States*, 282 U. S. 374, 75 L. Ed. 344, the United States Supreme Court held that a District Court of the United States has jurisdiction summarily to determine whether evidence should be suppressesd and papers returned. In that case there was a general exploratory search of the premises and the seizure of papers therefrom. The court pointed out that "the company is not mentioned in the complaint or warrant and is a stranger to the proceeding before the commissioner." The court there said:

> "There remains for consideration the question whether the search of the premises, the seizure of the papers therefrom and their retention for use as evidence may be sustained. The first clause of the 4th Amendment declares: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.' It is general and forbids every search that is unreasonable; it protects all those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken. Gouled v. United States, 256 U. S. 298, 307, 65 L. ed. 647, 651, 41 S. Ct. 261. The second clause declares, 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state

in the Union. Agnello v. United States, 269 U. S. 20, 33, 70 L. ed. 145, 149, 51 A. L. R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigiliance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. Boyd v. United States, 116 U. S. 616, 623, 29 L. ed. 746, 748, 6 S. Ct. 524; Weeks v. United States, 232 U. S. 389-392, 58 L. ed. 654, 655, L. R. A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177, *supra*."

As in the *Go-Bart* case, so here, there was a general, exploratory search, and as in that case, by pretension of right and threat of force, the investigators compelled the early inspection which they made of invoices for the months of October, 1942, and April, 1943. In the *Go-Bart* case, page 357, the court said,

> "By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 306, 68 L. ed. 696, 700, 32 A. L. R. 786, 44 S. Ct. 336."

This was like the *Glick Brothers* case, where the officers under their own claim of pretended authority or pretension of right, and threat that it would go "awfully tough" commenced ransacking the private files and records of the Glick Brothers and taking them out of the office each

night and taking them to the Office of Price Administration for surreptitious photostating.[5]

That Congress, under the Emergency Price Control Act of 1942, clearly intended all of the constitutional safeguards to be observed is shown by the fact that provisions were made in the section under "Administration and Enforcement" (sections 921, 922) to issue subpoenas, and "in case of contumacy by or refusal to obey a subpoena served upon any person referred to in subsection (c) the District Court in any district in which such person is found or resides, or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony and to appear and produce documents, or both, and any failure to obey such order of the court may be punished by the court as contempt thereof."

Thus Congress has not vested authority in the Administrator to punish for a violation of his subpoena, but has given the Administrator the right and power of subpoenaing with the enforcement of the same lodged in the courts.

Not even in the vortex of war power has Congress eliminated the necessity of lawful process in the securing of information. In the first War Powers Act of 1941, Title 50, U. S. C. A., Section 601, only the President was authorized to subpoena persons, etc., and in the Second War Powers Act of 1942, Title 50, App. Section 643, inspection and audit of war contracts is given by Congress; but by executive order No. 9127 of April 10, 1942, 7 F. R. 2753, even the authority to inspect war plants, to administer oaths or to issue subpoenas for the attendance

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[5]Mr. MacAdam said in his affidavit that he told the investigators not to steal any more records from the company. [R. 103-4.]

of witnesses or the production of books, records or other documents or physical evidence deemed relevant to the inquiry are conferred only upon limited persons and bodies.

All through the statutes runs the right of legal process to any of these boards or agencies, by which it must be inferred that Congress condemned illegal process or proceedings of any kind not authorized by law.

In *Federal Trade Commission v. American Tobacco Co.*, 68 L. Ed., the Court said:

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."

The Office of Price Administration has come into court to defend the seizure, just as the prohibition agents did in the *Go-Bart* case.

Back of every statute, rule or regulation stands the Constitution of the United States and the Bill of Rights as the supreme document which neither Congress, nor the Office of Price Administration, nor any other agency of the Government may ignore.

In *West Virginia State Board of Education v. Barnett*, 319 U. S. 624, the court held that the United States Government was set up by the consent of the governed and the Bill of Rights denies those in power any legal opportunity to coerce that consent, and that the purpose of the

Bill of Rights (which includes of course the 4th Amendment and unreasonable search and seizure) to withdraw certain subjects from the vicissitudes of the Government and to place them beyond the reach of majorities and officers and establish them as legal principles to be followed by the courts.

It is pointed out in that case that

> "Without promise of a limiting Bill of Rights it is doubtful that our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."

In *Hague v. The Committee for Industrial Organization,* 101 Fed. (2d) 774, the courts held that the constitutional provisions granting freedom from unlawful searches and seizures are of the very essense of civil liberty. The court further held that searches and seizures are unreasonable if they are carried out without probable cause. The court further held that the constitutional provisions granting freedom from unlawful searches and seizures are among the privileges and immunities of federal citizenship.

If as contended by the appellant Section 202 (b) of the Emergency Price Control Act gives the right to any investigators of the Office of Price Administration to go into any place of business and examine without probable cause and without personal knowledge upon the part of the searching officer of any wrongdoing and in fact with-

out any crime or crimes having been committed (*Hague v. Congress of Industrial Organization,* 101 Fed. (2d) 781), and there take and seize any records and documents, inspect them, copy them and remove them, at his whim and wish then we challenge that section as itself being violative of the 4th and 5th Amendments to the Constitution of the United States, as itself making provisions which violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and that right shall not be violated.

But not even under a search warrant may officers of the Government of the United States search and seize papers for the purpose of securing evidence.

In *Couled v. United States,* 255 U. S. 298, 65 L. Ed. 647, the court pointed out as follows:

> "Although search warrants have thus been used in many cases ever since the adoption of the Constitution and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the Boyd and Weeks Cases, *supra*, they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding. . . ."

The court further said in referring to some of the papers seized:

> "The Government could desire its possession only to use it as evidence against the defendant and to search for and seize it for such purpose was unlawful."

The court further said in this case that the 4th Amendment should be liberally construed in its favor.

In *Amos v. United States,* 255 U. S. 313; 65 L. Ed. 655, the court said that

> "The contention that the constitutional rights of defendant were waived when his wife, admitted to his home the Government officers, who came, without warrant, demanding admission to make search of it under Government authority cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected."

No consent could arise in view of the clear statement in the *Amos* case and the admitted fact that the investigators for the Office of Price Administration represented themselves to have authority to proceed under the Act.

In *Hague v. Congress of Industrial Organization,* 307 U. S., 527; 83 L. Ed. 1443, it is stated:

> "The Preamble of the Constitution, proclaiming the establishment of the Constitution, in order to secure the Blessings of Liberty uses the word 'secure' in the sense of 'protect' or 'make certain' . . ."

We respectfully submit that no greater duty devolves upon this court than to secure to its citizens the blessings of Liberty guaranteed by the 4th Amendment to the Constitution of the United States.

If the private records of all businesses are, as contended for by the government "quasi-public" records then the 4th Amendment to the Constitution has been abolished

by the Emergency Price Control Act, and any investigator for the OPA can roam into any place of business and supersnoop at will.

That Congress had no such intention of granting such attempt to sidestep the 4th Amendment of the Constitution of the United States is shown by the fact that in the last Act Congress provided "Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel." Thus it showed the congressional intent that not only should persons be subpoenaed but have the constitutional right to be represented by counsel in these proceedings.

Further analysis of the Act, however, shows clearly that Congress did not intend in these civil cases to give any more rights to the investigators for the OPA in civil matters than anyone else.

Under certain conditions persons who are classified as those being other than in the course of trade or business are given the right to bring an action and the government is not permitted to bring an action in the first instance unless those persons do not exercise that right.

Under such circumstances would any one say that the private individual could go into another man's place of business and demand access to those records claiming that they were "quasi-public" records and if such private person does not have the right, do investigators of the Government engaged in an exploratory search have the right to do so on the theory that something might turn up for which a penal action could be filed? No such intent and purpose appears in the Act and if it did so we respectfully submit that it would be in violation of the 4th and 5th Amendments.

Our early history of liberty was founded upon these constitutional guarantees. Even before the Constitution historians have said that the Declaration of Independence was written with the grievances in mind of King George III, who history states: "He has . . . sent hither swarms of officers to harass our people." (See Carl M. Becker, Declaration of Independence.)

It appears without contradiction that OPA officers and investigators alike were served in writing and that they were personally requested on August 7, 1943 to desist from any further investigation and that they did desist from any further investigation or illegal search or seizure, and that they did desist until August 13th when they returned again and were served in writing.

Is such procedure permitted either with or without search warrant by government agents seeking evidence to enforce a penalty?

In *Chester Bowles, Administrator v. Beatrice Creamery Company,* in the District Court of Wyoming, decided July 24, 1944, 56 Fed. Sup. 805, the court said, quoting from *Federal Trade Com. v. American Tobacco Co.,* 264 U. S. 298:

> " '2. The mere facts of carrying on commerce not confined within state lines and of being organized as a corporation do not make men's affairs public. *Id.*
>
> '3. A governmental fishing expedition into the papers of a private corporation, on the possibility that they may disclose evidence of crime, is so contrary to first principles of justice, if not defiant of the Fourth Amendment, that an intention to grant the power to a subordinate agency will not be attributed to Congress unless expressed in most explicit language. P. 306.

'4. The above act, (9), provides that the Commission shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any documentary evidence of any corporation being investigated or proceeded against, and that, to enforce compliance, writs of mandamus may issue upon application of the Attorney-General. *Held,* that access is confined to such documents as are relevant as evidence to the inquiry or complaint before the commission, and that their disclosure cannot be compelled without some evidence of their relevancy and upon a reasonable demand.' "

"The point to be accentuated would be that the rights of the government go only to such documents as are relevant to the matter under investigation and that disclosure thereof cannot be compelled without some showing of the relevancy. It is significant here in that the same sort of disclosure was authorized by Congress on behalf of the Federal Trade Commission as is authorized by the Act in connection with the enforcement of the Emergency Price Control Act. If the American Tobacco Company case correctly expounded the law in regard to the limitations which surround investigations by Federal authorities, how much greater is the offense as in the case at bar, that those authorities should go to defendants and demand the right to indiscriminately examine all their books, accounts and private business papers without any showing whatever as to their relevancy. By this decision no attempt may be inferred to limit the rights of the Administrator through the power of subpoena to secure testimony or the production of certain specified documents on proper showing being made as to their existence, but to sustain the act of the Administrator in these cases would mean that the affairs of any business

concern at any time, without showing, would be, in the language of Mr. Justice Holmes 'entitled to conduct fishing expeditions into private papers on the possibility that they may disclose evidence of crime'.

"Numerous cases are cited in that opinion which sustain the view of the Court as announced, and this Memorandum will not be prolonged by repeating them. That the Constitutional rights of the people are not restricted by War Emergencies, out of which the Price Control Act originated, is definitely announced in *Ex parte* Milligan, 4 Wall. 2. The conclusion therefore is that unless the inspection in this case was entirely voluntary on the part of the defendants, their Constitutional rights have been invaded and that their proper redress would be through the suppression of the evidence gained by the Administrator through such inspections.

"Without setting out in detail the evidence presented to the Court as to what occurred at the time the inspectors visited the business places of the defendants with the demand that they might be permitted to inspect the books, records and documents, it may be briefly said that the inspectors presented themselves at the respective places of business, revealed their identity and their designated authority as agents under the Price Control Authority and asserted that they had the power under the Act to demand and receive the right to make such inspection. While the evidence may vary to some extent, this seems to be the statement of what took place at the time. The testimony likewise varies somewhat as to what the attitude of the defendants was but evidently both consented, at least to the extent that they offered no physical force in objecing to the demand of the inspector. As it now appears, the representation of the agents that they had authority un-

der the Act to inspect, in a general way, all the books and records of the defendants, was erroneous as a legal proposition because, if we are correct in our conclusions, they had no such right and defendants' submission to the demand of the inspectors was in the nature of a peaceful submission to officers of the law and was not a consent amounting to a waiver of their Constitutional rights. United States v. Slusser, 270 Fed. (D. C. Ohio) 818; United States v. Marra, 40 Fed. 2d (D. C. N. Y.) 271; United States v. Rembert, 284 Fed. 996; United States v. Ruffner, 51 Fed. 2d, (D. C. Md.) 579; *In Re* Lobosco, 11 Fed. 2d, 892.

"For the reasons stated, all evidence secured by the Agents of the plaintiff through their illegal demand for inspection without Constitutional authority, together with all evidence which was subsequently secured by them through the revelations of such illegal inspections and examinations of the books, accounts and records of the defendants will be suppressed in the cases pending and an appropriate order may be submitted to this effect, in collaboration with counsel for plaintiff, on or before July 31, 1944, exceptions being reversed and allowed to plaintiff."

The matter of unlawful search and seizure is within the summary control of the trial court.

In the case of Schechter v. United States, 295 U. S. 495 (79 L. Ed. 1570-1591), Justice Cardozo said:

"I pointed out in an opinion that there had been no granting to the investigator of any roving commission to inquire into evils and then, upon discovering them, do anything he pleased. . . ."

If this power could not even be granted to the President how much less could it be granted to a couple of investigators for the OPA?

IB.

The Emergency Price Control Act, as Construed and Applied by the Circuit Court of Appeals Is Unconstitutional and in Violation of the Fourth and Fifth Amendments to the Constitution of the United States.

As construed by the Circuit Court of Appeals, the provisions of the Emergency Price Control Act of 1942 permit any investigators to go into any man's place of business and rummage at will, and then use the evidence so gained against the person whose place of business has been rumaged to bring a civil action but penal in nature and to use such evidence and data against him without any processes or proceeding.

It is respectfully submitted that such a construction is in conflict with the Fourth Amendment of the Constitution of the United States and the decision of *Boyd v. United States,* 29 L. Ed. 746, which decision was handed down after the Civil War.

Certainly the Government's business has not become everybody's business—yet. And everybody's business has not become the Government's business—yet. But this decision would make it so.

In *United States v. Lefkowitz,* 285 U. S. 463, 76 L. Ed. 882, the court said: "The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy." Also: "Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not be searched for and taken even under a search warrant issued upon ample evidence precisely describing such things and disclosing exactly where they were."

This Court has called the mea a "war time meas-
ure." But the United States S e Court has said
in Ex parte Milligan, 4 Wall. 2, 21:

"The Constituion of the d States is a law
for rulers and people, eq in war and in
peace."

In *Ex parte Endo,* 89 L. Ed. 229, the Supreme Court said:

We mention these constitution visions not to stir
the constitutional issues which h en argued at the
bar but to indicate the approach we think should
be made to an Act of Congress o order of the Chief
Executive that touches the sensiti a of rights speci-
fically guaranteed by the Consti This Court has
quite consistently given a narrow pe for the opera-
tion of the presumption of consti ality when legisla-
of the Constitution. We have like pecific prohibition
pretation of legislation which giv favored that inter-
of surviving the test of constituti he greater chance
are suggestive here. We must ass y. Those analogies
cutive and members of Congress, a at the Chief Exe-
sensitive to and respectful of the as the courts, are
In interpreting a war-time mea ies of the citizen.
that their purpose was to allow we must assume
sible accommodation between t he greatest pos-
exigencies of war. We must a liberties and the
find implied powers in a grant o when asked to
tive authority, that the law ma slative or execu-
no greater restraint on the citi ntended to place
and unmistakably indicated by t han was clearly
guage they used.

As the United States Supreme C as said in *Thomas v. Collins,* 89 L. Ed. 340, p. 354,

"The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the National itself, can prohibit, restrain, or impede. If the restraint were smaller than it is, it is from petty tyrannies that larger ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in the soil grow great, and, growing, break down the foundations of liberty."

The Circuit Court erred in factual statements in the case with reference to the unlawful search and seizure. At the time that the officers seized the records, none of which were before the Court, the officers admitted that they had only looked at two month's invoices. It was only after the notices to desist in violation of the constitutional rights of the appellees that the agents of the Government seized and copied other records and invoices, which have become the basis of their present complaint.

And what the Circuit Court has overlooked is that *officers of* the Government may, under the expression of this Court, *search* and *seize* records in order to make a *civil* case against individuals.

Never before in the history of the United States do we know of any litigant, either the Government or other litigants, being able to search and seize a person's place of business for the purpose of suing him civilly. Surely no private litigant, having the right to sue for treble damages, could go into a store and grab records for the purpose of bringing this type of action. Has the Government any more rights than private litigants for bringing the action under the

O. P. A. law, and can the Government officers, by reason of their official position, do what private litigants can not do? The question calls for serious and sober reflection and reconsideration.

The Circuit Court has stated in its opinion that:

> "Nor in a civil action does illegality of the means by which evidence has been procured afford grounds for a Motion to Dismiss. The defenses which may be interposed by motion are confined to those enumerated in Rule 12-B."

The Circuit Court has overlooked the fact that while this is a civil action in form, it is penal in its nature. Therefore, no matter how the cause of action might be disguised, or what terminology may be applied to it, whether civil, penal, criminal, or otherwise, the guarantees of the Fourth Amendment are equally applicable.

The Circuit Court has evidently overlooked the fact that the case of *Boyd v. United States*, 29 L. Ed. 746, was a civil case in which there was a suit to forfeit 35 cases of plate glass. The court in its analysis of that case said:

> "It is our opinion therefore that a compudsory production of a man's private papers to establish a criminal charge against him, *or to forfeit his property*, is without the scope of the Fourth Amendment to the Constitution, in all cases which a search and seizure would be."

And the court further said:

> "Now it is elementary knowledge that one cardinal rule of the Court of Chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property is

contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power; but it cannot abide the pure atmosphere of political liberty and freedom."

The court further points out:

"Reverting then to the peculiar phraseology of this Act and to the information in the present case, which is founded on it, we have to deal with an Act which expressly excludes criminal proceedings from its operation, although embracing civil suits for penalties and forfeitures, and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both."

Thus it appears that the Boyd case is a complete answer to the statement of the Circuit Court that in civil actions the illegality of the means by which evidence has been procured does not afford grounds for a Motion to Dismiss. This is contrary to the express provisions of the Fourth Amendment which we do not deem that Congress intended to override in adopting the Emergency Price Control Act, for along with all the other presumptions it must be presumed that Congress intended to adopt an Act in compliance with the Fourth Amendment and with the free spirit of American government for which we are fighting.

II.

The Circuit Court of Appeals Erred in Holding That Records of a Corporation or of Individuals Become Quasi-Public Records by Reason of the Emergency Price Control Act of 1942.

If the decision of the Circuit Court of Appeals is to remain the law in this case, then everybody's business is the Government's business, for no person is immune from the O. P. A.'s requirements of today. Therefore, everybody's records are quasi-public records, whether in their private vault, as in the case of these petitioners or somewhere else. Everyone today must make out some kind of records for the Office of Price Administration, have some kind of O. P. A. stamps in their possession, and otherwise are beholden to this Agency. Does this make everybody's home, office or business subject to a roving commission by the investigators of the O. P. A.? If these records are quasi-public and require no process or pretended process, then the Fourth Amendment has been abolished by an Act of Congress and such a holding would raise a challenge as to the validity of the Statute itself as being violative of the Fourth Amendment to the Constitution of the United States. (*Boyd v. United States*, 29 L. Ed. 746, 116 U. S. 660.) In that case this Court held an Act of Congress invalid which made the failure to produce certain books, papers and records in Court an admission of tax liability. Here the Act as construed by the Circuit Court goes even further and makes all records of any corporation or person quasi-public in the discretion of the investigators of the O. P. A.; abolishes all need for subpoena *duces tecum*, process or pretended process of any kind or character.

We have had other wars, but the restrictions against unreasonable search and seizures have always extended to all those periods.

If Congress had desired to clothe the Administrator with such arbitrary powers, it could have well said so and it did not lack any language to say that all records would be *quasi-public* records and that the Administrator would have access to them at all times.

But the Congress did not give such rights, for if it had done so it would not have provided for the power of subpoena and the processes of Court in the Act.

There would have been no reason for giving any such powers in the Act as the subpoena powers and there would have been no provisions in the Act requiring a hearing in Court for contumacy for disobeying the Act. It would have provided that any person who disobeyed the Administrator would be in contempt and could be summarily taken into Court. This the Act did not provide. In fact no Act of Congress has ever gone so far as to declare all records to be *quasi-public*, even though they are necessary to be kept. Thus income tax records are not declared to be *quasi-public*, although they are declared to be kept for the Internal Revenue Department. Alcohol tax records are not designated as *quasi-public*, although the Government has for many years levied heavy taxes on whisky and alcohol and it has been one of the main supports of the Government since early days. Yet nowhere have these records been held to be *quasi-public*. Even under prohibition days and the constitutional provisions against alcohol was there any relaxation of the constitutional mandates forbidding unlawful search and seizure, and there is nothing in any war time legislation as broad as that here stated by the Court.

Not even the right to inspect Government contracts has carried with it such broad powers. The Wage and Hours law did not give the Secretary of Labor power to inspect records without proper subpoena. (*Cudahy Packing Company v. Holland*, 315 U. S. 355, 86 L. Ed. 895.)

Great reliance is placed by the Circuit Court of Appeals upon the case of *Wilson v. U. S.*, 221 U. S. 361, 55 L. Ed. 771, where the Court pointed out the distinction in the matter of privilege between private papers or records and those of a public or *quasi-public* nature, saying that in the case of public records and official documents the officer in possession of them is not justified in resisting inspection, even though the record was made by himself and would supply evidence of his criminal dereliction.

But the Circuit Court has overlooked the fact that the *Wilson* case is based upon a *subpoena duces tecum* in which the corporation was commanded by *legal process* to produce the records specified in the subpoena.

The *Wilson* case is not authority for the fact that no process is required to produce the records, but on the contrary is authority for the fact that process is required. The Court specifically says in the *Wilson* case, referring to the *subpoena duces tecum* "That demand, expressed in *lawful process*, confined its requirements within the limits which reason imposes in the circumstances of the case, the Corporation has no privilege to refuse."

Thus the Supreme Court has said that whether the records are public or private or *quasi-public*, a demand expressed in lawful process (*subpoena duces tecum*) requires their production.

With this principle we agree, for it is the mode and manner in which not only the *Wilson* case holds that it is proper for documents to be produced, but it is the expression of the Emergency Price Control Act itself.

For why would the Act provide for subpoena at all if the records of all persons or corporations were *quasi-public* and could be inspected without them? The question answers itself.

Furthermore, Congressional investigation of the acts of the officers of the Office of Price Administration in overlooking the subpoena process is itself strong and cogent proof that Congress felt that its authority had been abused. The very counsel who had appeared before this Court was called before a Congressional Committee and interrogated regarding the improper use of *subpoena duces tecum*.

Furthermore, if officers of the O. P. A. can enter a place of business and seize records, as in this case, then the other provisions of the Act become a nullity for such procedure would deprive all businesses of their right of counsel or their right to have a receipt taken for any books and papers that are seized.

Any corporations and individuals might have a complete defense to any charges of violation of the Act for which damages are sought and might have a complete defense to such suits but would find all their records gone with no receipt, with no redress, with no rights.

Congress surely did not put any such provision in the language of the O. P. A. Act.

In the case of *Rodgers v. United States*, 138 F. (2d) 992, there was no issue of the requirement of a *subpoena* nor of any investigation under an unlawful search and

seizure under the circumstances of the present case. In fact the only question involved in the *Rodgers* case was whether the Act which requires a farm operator to make reports pursuant to the Cotton Marketing Quota Provisions of the Agricultural Act of 1938 invaded the right of privacy or constituted unjust coercion. This is very different from the case at bar. The Court in that case only held that those engaged in business subject to public regulation were under an obligation to keep records and make reports. The Court there said:

> "The keeping of records and the making of reports under the statute of which appellant complains have none of the characteristics of entrapment, invasion of the right of privacy or unjust coercion of individuals which are the genesis of the Fourth Amendment."

Thus this very case would be authority for the fact that the appellees' right of privacy was invaded, that they were not unjustly coerced—the genesis of the Fourth Amendment.

The case of *Fleming v. Montgomery Ward*, 114 F. (2d) 384, a Fair Labor Standards case, was also a case where the Wages and Hours documents were sought under a *subpoena duces tecum*. Again we have unlawful process expressed in the form of a subpoena and the Court further discusses the need for probable cause before there can be a search and seizure. The case is further authority for the fact that not only must there be a *subpoena duces tecum*, but the subpoena must be reason-

able and after its issue the person against whom it is issued may appear in Court to determine the reasonableness of the subpoena before it is required to produce that which has been commanded in lawful process.

In the case of *Gukenheimer & Co. v. United States*, 3 Fed. (2d) 786, there again was an investigation by the Federal Prohibition Agents regarding whisky shipments. The prohibition officers demanded and received the papers in question. It appears that the papers were given up voluntarily and therefore the Court held that the defendants in that case

> "having voluntarily surrendered the papers for one purpose, their use at the trial of this case for another purpose was not the result of a search and seizure, and therefore was in violation of the corporation's rights under the Fourth Amendment."

It would appear, therefore, that the Court conceded that the corporation had rights under the Fourth Amendment, but that in the instant case they were not violated.

III.

In Prescribing Rules in Civil Actions, This Court Has Held Not Even the Supreme Court of the United States May "Modify, Abridge or Enlarge the Substantive Rights of Litigants Under the Constitution of the United States or Enlarge or Diminish the Jurisdiction of the Federal Courts."

The court was without jurisdiction to proceed in this case.

The appellant proceeded on the theory that jurisdiction is conferred by a mere assurance in their complaint "jurisdiction in this action is conferred upon this court by Section 205(c) of the Act and by Section 205(e) of the Act but such assertion is insufficient to confer jurisdiction, for jurisdiction is three-fold: First of the person, sceond of the subject matter and third, to bring the particular action in the case. In this respect not even the Supreme Court of the United States in prescribing rules of procedure in civil actions may modify, abridge or enlarge the substantive rights of litigants under the Constitution of the United States or enlarge or diminish the jurisdiction of the federal courts.

United States v. Sherwood, 312 U. S. 584, 85 L. Ed. 1058;

Shibbach v. Wilson, 312 U. S. 1, 85 L. Ed. 479;

United States v. 11,150 Pounds of Butter, 195 Fed. 657, 663.

The complaint in this case fails to set up a single fact from which the court can determine whether it has jurisdiction of the subject matter. The complaint does not state the persons to whom the lumber was claimed to be

sold, does not state which one of the defendants sold it, and does not state any fact from which the court itself could determine that it has jurisdiction of the subject matter of this litigation.

In *Securities and Exchange Comm. v. Time Trust, Inc.*, 28 Fed. Supp. 34, at page 42, the court said:

> "The Securities Act permits of both civil and criminal proceedings. The allegations of the complaint should be as simple as those of an indictment under the provisions of the mail fraud statute. In Hagner v. United States it was said that the true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet. Here the allegations of fraud are not only in the language of the statute, but they are also set forth with particularity so as to apprise the defendants of the charges against them."

The court points out that the "allegations show in detail the mechanics and operations of the plan" and specify "fifteen specific representations which defendants are charged with having made or caused to be made . . ." "The complaint, exclusive of the exhibits attached thereto, consists of twenty typewritten pages, . . ." The court says that the complaint "fully conforms to the new Rules of Civil Procedure."

In *United States v. Johnson*, 53 Fed. Supp. 167, the court held with reference to an indictment in an OPA case:

> "Sufficient facts of a crime committed must be stated in an indictment to support a conviction. Specifically, the court and defendants must be able to determine this from the indictment, the statutes and the pertinent administrative regulations passed pursuant to the statutes. If the facts alleged may all be true and yet appear to constitute no offense, the indictment is insufficient. . . ."
>
> "The purpose of such requirements is to give a defendant the fair opportunity to prepare his defense and enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime. . . ."
>
> "It is impossible to glean from the allegations of each indictment, the Act, and the regulations what, in fact the ceiling price was for the commodity, notwithstanding that the prices mentioned in the indictments are the ceiling prices or are below the ceiling prices. Since the Act and the regulation do not establish any specific ceiling price for the commodity *sub judice*, defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner in which it arrived at this conclusion. It may be that the government's method of calculation is erroneous. If so, defendants should have the opportunity to challenge this defect if, in fact, it exists."

Judged by these standards nothing is set out in the complaint that gives the court or defendant fair notice of the case, nor does it give the court or defendant an opportunity to determine whether a claim is stated. As

this is a penal statute it should be strictly construed in the light of penalty and as time and place are material elements in considering whether a complaint states jurisdictional facts (Rule 9(f), Rules of Civil Procedure), it is respectfully submitted that the complaint states insufficient jurisdictional facts.

In *Fleming v. Dierks Lumber and Coal Company*, 39 Fed. Supp. 237, the court said:

> "I am of the opinion that the framers of the rules did not intend to permit a plaintiff to subject a defendant to the various processes of the court without first stating definite facts upon which a judgment might be based. . . ."
>
> "I do not think that Rules 26-37 relating to depositions and discovery should supplant the requirement of pleadings sufficiently advising a defendant of the nature of the claim and enabling him to prepare his responsive pleading and generally prepare for trial. . . ."
>
> "A 'short and plain statement' must be reasonably definite or it will not be plain. A speedy and just and inexpensive trial cannot be had merely upon the filing of a notice of claim and then resorting to the expensive and indefinite procedure of discovery and depositions."

Jurisdiction—the power to hear and determine the cause, and to bring the action, is only conferred upon the administrator when a certain state of facts exist—and not in all cases.

Section 925 (205-e), Title 50, App.

Hence, before a claim is state
had, the complaint must state f which relief may be
may determine and which the de om which the court
that the court may determine w its may challenge so
exists. jurisdiction in fact

These are conditions preceden

This is as essential as an alle inging the action.
the court may determine divers of fact from which
$3,000 jurisdiction amount in c citizenship and the
facts are necessary to jurisdicti ases, in which such

It is clear from the Act, that a federal court.
for which relief can be had. der to state a claim
cify each transaction so that the mplaint must spe-
may see, and that the parties m in the first instance
condition precedent has or has ermine, whether the
say, whether the buyer has or en place, that is to
who the buyer is, and what type not filed an action,
may be determined whether the a right to bring the action. Unyer he is, so that it
the court cannot tell whether it ment has or has not
is the defendant in a position to ese facts are set up
of jurisdiction for want of com risdiction. Neither
precedent, namely, an allegation he question of lack
and the type of buyer he is, and with the conditions
brought an action and what the who the buyer is
brought an action the governme r he has or has not
diction. If he is a buyer in the was for. If he has
business, as that may ultimately uld not have juris-
buyer in bad faith and would not course of trade or
action, then the government wou fined, or if he is a
each of these things must necessa a right to bring an
plaint by the plaintiff, who has e jurisdiction. But
set up in the com-
rden of going for-

ward and setting forth facts which show the court that it has jurisdiction.

Footnote: In a criminal complaint a typical charge is as follows: *Fink v. U. S.*, No. 10483, U. S. Circuit Court of Appeals for the Ninth Circuit (Count One):

> "That on or about the 1st day of June, 1942, in the City of Los Angeles, County of Los Angeles, State of California, in the District aforesaid and in the Central Division thereof, and within the jurisdiction of this Court, California Refrigeration Repair Shop, a corporation, and Charles L. Fink, did knowingly, wilfully and unlawfully offer for sale, and sell and deliver to William H. Hensey, an individual, a certain used 1934 Frigidaire Model No. Std. 534 refrigerator in 'as is' condition, for the sum of $88 plus $2.64 California State Sales Tax, which said refrigerator had a maximum ceiling price of $20 under the provisions of Maximum Price Regulation No. 139 (7 Fed. Reg. 3393, 7 Fed. Reg. 6053) issued by Leon Henderson, as Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942 (Emergency Price Control Act of 1942, (Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23, January 30, 1942); contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States (Emergency Price Control Act of 1942, Pub. L. 421, 77th Cong. 2d Sess., 56 Stat. 23, January 30, 1942). (3)"

A claim for a penal action must be well pleaded and at least have the elements of an indictment. (*Securities and Exchange Commission v. Time Trust*, 28 F. S. 30.)

Compare this with the charging part of the allegation of the complaint in the *Glick* case, which is as follows:

> "From and including October 1, 1942, more than six months after the effective date of the Act, to and including September 30, 1943, the defendants, and each of them, dealers in lumber, doing business at 8423 South Alameda Street, in the City of Los Angeles, State of California, sold and delivered at Wholesale various grades and kinds of lumber to various and divers customers. None of said purchases was made for use or consumption other than in the course of trade or business. The defendants, and each of them, demanded and received a price or consideration for each such delivery of said lumber in excess of the maximum price established therefor by the General Maximum Price Regulation."

Remembering that in the pleadings of a penal nature that the pleadings should specify enough to inform the accused of the nature and cause of the accusation (*U. S. v. Cruickshank*, 92 U. S.) it is respectfully submitted that the complaint in this case failed to set forth a single fact from which the court can tell it has jurisdiction or the defendants can challenge it.

IV.

The Statute, as Construed and Applied in This Case, Is Unconstitutional, as Having No Reasonable Relationship Between the Congressional Intent and the Acts of the Price Administrator.

Fair construction of the "Enforcement" section giving damages would indicate that it was the "poor man's" remedy for any overcharges for consumer goods, this being shown by the fact that it provided for $50 or three times the overcharge, whichever was greater, as damages for such overcharge.

In Senate Report 931, Seventy-seventh Congress, it is said:

> "Such actions have proved valuable in the enforcement of other regulatory statutes, such as the Fair Labor Standards Act, both to relieve the government of a part of the burden of enforcement and to deter initial violations. They afford the remedy at law to persons *damaged* by having had to pay unlawfully high prices."

In the Fair Labor Standards cases and other statutes giving a right of action, the person damaged is given the right of action.

But the Emergency Price Control Act, after presumably having this purpose in mind, then proceeds to take it away from most purchasers, and says the Administration may sue, but not the purchaser who was damaged, if the purchase was made "in the course of business or trade"—which words are not defined.

The Emergency Price Control Act as originally offered did not contain any such provision. (See Congressional Record, Vol. 87, part 8, page 9074, entitled

"Enforcement.") Upon presentation of the section (Congressional Record, Vol. 87, part 9, page 9148) under "Enforcement" this provision again was not in the Act. It was only shortly before the law was passed that subsection (e) was put into the Act. The Congressional Record does not reveal any debates or discussions before Congress with reference to this section, and the legislation was passed as emergency legislation. It is significant, as appellant's brief points out, that the purpose of the Act was to "permit private purchasers who buy for personal use or consumption, rather than in the course of trade or business, to protect themselves against violations of the Act." (App. Br. p. 14.)

The House bill had contained no treble damage provision. The Senate draft of the section was not changed by the conference committee and was enacted by Congress.

But Congress, in enacting a law providing a maximum penalty of $5,000 for a criminal offense and for civil sanctions by way of injunction for other provisions, did not intend to provide the Administrator with the right to penalize a person or business by bringing this kind of action when the courts themselves, in criminal actions, were authorized to impose a maximum fine or penalty of $5,000.

The provision enabling the Administrator to sue was no doubt put in the bill to provide the United States a remedy, where the United States is the consumer, and also if the buyer is not entitled to bring suit because he is barred for bad faith in being a black market operator.

This was the position taken by the District Court, and it is supported by the report of Mr. Brown in the Com-

mittee on Banking and Currency, 77th Cong. Report 931, to accompany the H. R. 5990. This report states:

> "The further provision that the Administrator may sue on behalf of the United States, not only where the United States is the consumer, but also if the buyer is not entitled to bring suit, will apply to situations in which the buyer is barred for bad faith or for some other reason, or in which the buyer is a purchaser in the course of trade or business."

The discussion, however, does not define "course of trade or business" and does not throw any light on who is a buyer within the meaning of the Act. That a considerable portion of the Act is devoted to rent regulations, which are defined to be a commodity within the meaning of the Act, and that the section was designed only to permit damages to be recovered by persons who are *damaged* by having had to pay unlawfully high prices, is clear from the entire tenor of the Act. Yet this second portion of the section and the provision which is now under construction, would bar the buyer completely from any remedy or damages, and would therefore have no reasonable purpose or relationship to the object Congress sought to have in this provision.[4]

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[4]Senate Report 931, Seventy-seventh Congress, says: "Such actions have proved valuable in the enforcement of other regulatory statutes, such as the Fair Labor Standards Act, both to relieve the government of a part of the burden of enforcement and to deter initial violations. They afford the remedy at law to persons *damaged* by having had to pay unlawfully high prices."

Of course no one would deny the Administrator the right to bring an action if the government was the purchaser and in fact was damaged, and in those cases, as construed by the court in this case, the operators were "black market operators." The Act could reasonably be enforced under those circumstances by the Administrator. But any other purpose or object has no reasonable relationship to the objects sought to be attained, and therefore this particular provision is unconstitutional and void. (6 *R. C. L.* 207; *In re Page,* 19 Cal. App. (2d) 1.)

Federal and State Authorites Holding Statute Must Have a Reasonable Relationship Between the Purposes Expressed and the Object Sought to Be Attained Are the Following:

1 *Wigmore on Evidence* (2d ed.), Sec. 7;

Manley v. Georgia, 279 U. S. 1;

Tot v. U. S., 319 U. S. 463 (1942), 87 L. ed. 1524;

Western & Atlantic v. Henderson, 279 U. S. 639, 73 L. ed. 884 (1929);

In re Opinion of Justices, 208 Mass. 619, 94 N. E. 1044 (1911);

Hammond v. State, 78 Ohio State 15, 84 N. E. 416, 125 A. S. R. 684 (1908);

State v. Grimmett, 33 Idaho 203, 193 Pac. 380 (1920).

V.

The Statute Is Too Vague and Indefinite to Form a Standard for Illegal Conduct and to Inform Men When They Might Be Liable to a Penalty and Therefore Violates the Fifth Amendment to the Constitution of the United States.

The District Court, in its opinion, while holding that the statute was vague, indefinite and uncertain, endeavored, nevertheless, to uphold its constitutionality as to the meaning of the words "for use or consumption other than in the course of trade or business." It construed the statute to have an application to the bootlegger, and on this basis upheld the constitutionality of the vague portions of the statute. The question was argued at length in the Circuit Court of Appeals, but that Court did not pass on the issue thus raised.

It was the right of the appellee to have the decision of the Court below sustained, even though upon different grounds than those used by the District Court, and the decision below should be sustained if it can be upon any ground urged by the petitioner herein, who was the appellee below. *Helvering v. Gowring,* 302 U. S. 238, 82 L. Ed. 234.

It is a fundamental rule in the Federal Court that a party in an appeal is entitled to have each point raised by him, even though he is the appellee, passed upon by the Circuit Court of Appeals. Also, that the appellee may urge any matters appearing in the record in support of the judgment below and to have the Court pass upon the same. (*United States and Interstate Commerce Commission v. American Railway Express Co., et al.,* 265 U.

S. 425; *Holyoke Water Power Co. v. American Writing Paper Co.*, 83 Fed. (2d) 398, 402; *Lagnes v. Green*, 282 U. S. 531.)

Before the Administrator had a right to bring the action, he had to show that the statute had conferred jurisdiction upon him by reason of the conditions precedent set forth in the statute and by reason of the fact that the commodity was purchased for use or consumption in the course of trade or business. If it was purchased "for use or consumption other than in the course of trade or business," then the purchaser under the statute would have the right to bring the action and not the Administrator, but this phrase was for use or consumption other than in the course of trade or business, has no definition in the statute and it is so vague and indefinite as to fail to form a standard for a penalty. Its meaning has resulted in conflicting decisions by different District Courts. The Circuit Court of Appeals entirely avoided meeting the issue raised by the petitioner as to the indefiniteness of this phrase "in the course of trade or business."

The phrase in the statute "in the course of trade or business" upon which this action is based is so vague and indefinite as to fail to form a standard for a penalty—that it requires further definition not contained in the statute. The courts have been confused as to the meaning of the phrase "in the course of trade or business," as shown by conflicting decisions through various circuits in the country. The decision of this Court has entirely avoided meeting the issues as to the indefiniteness of the phrase "in the course of trade or business" raised by appellee in its brief. We cited *Hewett v. State Board of*

Medical Examiners, 148 Cal. 590, and cases therein cited; *Connolly v. General Construction Company,* 269 U. S. 382, 70 L. Ed. 322; *U. S. v. Capitol Traction Co.,* 34 App. D. C.

In *Bowles v. Seminole Rock & Sand Company,* No. 914, October 1944 term, now before this Court the District Court held that the right of action was in the purchaser; the Circuit Court held it was in the administrator.

In *United States v. Capital Traction Co.,* 34 App. D. C., there is an approved test, as follows:

> ". . . The dividing line between what is lawful and unlawful canont be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

No better argument exists as to the uncertainty of the statute than that different courts differ as to the meaning and application of the phrase.

Who is a "user in the course of trade or business" or who is a person who "is dealing in a commodity other than in the course of trade or business"?

What is the meaning of "course of trade or business"? Is one who buys an article which he consumes to make products for another acting in the "course of trade or business"?

A person who goes into a store and buys a commodity is engaging in trade or business. In the ordinary sense of the word every purchaser and every seller of a commodity is engaging in trade or business. Some courts have attempted to read into this phrase a meaning that it is for persons who buy or sell for their own consumption, but the statute does not say this. On the other hand, the statute leaves the matter entirely indefinite. We must therefore perhaps look to the purposes and objectives of the statute, if they can be determined; and if the statute has no reasonable relationship to the objects sought to be attained, then it is unconstitutional.

The Emergency Price Control Act as originally offered did not contain any such provision. (See Congressional Record, Vol. 87, part 8, page 9074, entitled "Enforcement.") Upon presentation of the section (Congressional Record, Vol. 87, part 9, page 9148), under "Enforcement," this provision again was not in the Act. It was only shortly before the law was passed that subsection (e) was put into the Act. The Congressional Record does not reveal any debates or discussions before Congress with reference to this section, and the legislation was passed as emergency legislation. It is significant, as appellant's brief points out, that the purpose of the Act was to "permit private purchasers who buy for personal use or consumption, rather than in the course of trade or business, to protect themselves against violations of the Act." (App. Br. p. 14.)

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> "The further provision that the Administrator may sue on behalf of the United States, not only where the United States is the consumer, but also if the buyer is not entitled to bring suit, will apply to situations in which the buyer is barred for bad faith or for some other reason, or in which the buyer is a purchaser in the course of trade or business."

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siderable portion of the Act is devoted to rent regulations, which are defined to be a commodity within the meaning of the Act, and that the section was designed only to permit damages to be recovered by persons who are *damaged* by having had to pay unlawfully high prices, is clear from the entire tenor of the Act. Yet this second portion of the section and the provision which is now under construction, would bar the buyer completely from any remedy or damages, and would therefore have no reasonable purpose or relationship to the object Congress sought to have in this provision.

10a Senate Report 931, Seventy-seventh Congress, says:

> "Such actions have proved valuable in the enforcement of other regulatory statutes, such as the Fair Labor Standards Act, both to relieve the government of a part of the burden of enforcement and to deter initial violations. They afford the remedy at law to persons *damaged* by having had to pay unlawfully high prices."

The Confusion of the Courts as to the Meaning of "in the Course of Trade or Business."

Numerous cases have already arisen under Section 205 (e) of the Act wherein judges of the various United States District Courts over the country have been obliged to interpret the language "in the course of trade or business" as used in that section.

If that language is clear and certain, those intelligent and highly trained judges must necessarily arrive at the same understanding as to the meaning of the words in question; they could not arrive at conflicting conclusions.

But if those enlightened judges, in seeking to carry out Section 205 (e) in cases brought before them, arrive at different and conflicting conclusions as to the meaning of the phrase "in the course of trade or business," that is proof conclusive of the vagary and uncertainty of the language.

The distinction must be borne in mind in determining the type of action herein. This action is penal.

Section 205(e) in so far as It Purports to Render a Seller Liable to the Government for Treble the Overcharge, Is Penal; and the Amount Recoverable by the Government Thereunder Is a Penalty.

"Remedial" and "Penal" Defined and Distinguished.

The distinction between a "remedial" action and a "penal" action is, that the former is given to, and is brought by, the party injured or aggrieved, and the recovery allowed is as compensation or indemnity for the injury done or loss sustained; such an action is "remedial," and the amount recoverable therein is held to be "compensatory" and "remedial" even though the amount recoverable is greatly in excess of the actual damage provable or sustained.

But where a statute provides that upon the commission of certain acts, by a person, the state or government is given the right to a pecuniary recovery from the person, not as compensation for any pecuniary damage sustained by, the state or government, but rather as punishment for the act of omission, then the amount recoverable is a "penalty" and the action which may be brought by the state or government for its enforcement or collection, is a "penal" action.

It is to be remembered that "penal" and "criminal" are not synonymous. "Penal" statutes are not confined or limited to "criminal" statutes; and while all "criminal" statutes are "penal," all "penal" statutes are not criminal. A statute imposing a penalty (in dollars) which is enforceable by civil action by the state or government, is as much a "penal" statute as one imposing a "fine" (in dollars) enforceable by the state or government in a "criminal" action.

U. S. v. La Franca, 282 U. S. 568;
U. S. v. Choteau, 102 U. S. 603.

"Consumers' Suits" and "Government Suits" Defined.

"Consumer's suit" as used throughout this brief, and as used by the courts in cases arising under Section 205(e) means a suit by any person who, in the purchase of a commodity, was charged a price in excess of the maximum price fixed by regulation or schedule of the Office of Price Administration. (Often herein called O.P.A.) Such suits are against the seller who made the overcharge, and are for treble the amount of the overcharge, or for $50.00 plus attorneys fees and costs, whichever is the greater.

"Government suit" means a suit brought by the Administrator of the O.P.A. on behalf of the United States, against a person who sold a commodity to some person other than the Government, at a price or prices in excess of the maximum price fixed by O.P.A. for such commodity. Of course suits brought by the Government on account of overcharges in sales to the government, fall in the class of "consumers' suits."

"Consumers' Suits" Are "Remedial."

It is a well settled rule that where a statute gives to an injured or aggrieved party a right of recovery in an arbitrary amount, the amount recoverable, even though in excess of the damage actually sustained or provable, is as compensation for the injury done or loss sustained, and such recovery is compensatory and "remedial." The real test of whether the statute or action is "remedial" or "penal" is whether the right of action is given to the injured or aggrieved party, or to the state or government. If given to the injured or aggrieved party, the statute, and the recovery allowed thereby are "remedial"; but if the right of recovery is given to the state or government then the statute and the recovery allowed thereby are "penal."

The above rule is amply demonstrated in a wide variety of cases, a few of which are as follows:

Chattanooga Foundaries & Pipe Co. v. Atlanta, 204 U. S. 390, wherein it was held that treble damage actions authorized by the antitrust act, by persons injured as a result of conspiracies and monopolies prohibited by the act, are "remedial," not penal.

Overnight Motor Transportation Co. v. Missèll, 316 U. S. 572, wherein it was held that actions by employees under the Fair Labor Standards Act, for the recovery of double the amount of unpaid wages, are "remedial," not penal.

Brady v. Daly, 175 U. S. 148, wherein it was held that, under the copyright infringement statute authorizing a recovery of $100.00 for the first day and $50.00 for each subsequent day of infringement, the amounts recoverable by the owners of the infringed copyrights are "remedial," not penal.

A. T. & S. F. Ry. v. Nichols, 264 U. S. 348, wherein it was held that the statute providing for a minimum and flat $5000.00 recovery, for death caused by the negligence of another, is remedial, and that the $5000.00 recovery provided therein is "remedial."

Whitman v. Oxford Bank, 176 U. S. 559, wherein it was held that statutes imposing a double liability upon shareholders of banks, in favor of depositors or creditors, are "remedial."

Cox v. Lykes Bros., 237 N. Y. 376, 143 N. E. 226, wherein Justice Cardozo, then Chief Justice of the New York Court of Appeals, held that a suit under the Federal Seaman's Act, which provided that seamen, whose wages were withheld, could recover two days' wages for every one during which payment was withheld, was not a suit to recover a penalty, but was a "remedial" action, and the amount recoverable was "remedial."

It will be noted that in each and all the foregoing cases and instances, the actions and the allowable recoveries are held to be "remedial" because the respective statutes provide for the bringing and maintenance of the action *by the injured or aggrieved individuals*—never by the state or government.

But entirely aside from the aforesaid well settled general law, which is fairly demonstrated by the foregoing cases, a large number of cases have been heard and decisions rendered in "consumers' suits" brought under said section 205(e) of the Emergency Price Control Act wherein the courts, generally over the country, have consistently held that such "consumers' actions" are remedial, and that the recoveries allowed therein are "remedial," rather than

penal. Practically all consumers' suits are brought in state courts, and in most instances in the lower state courts, where decisions and opinions are not reported in the published reports. However those decisions are reported in Commerce Clearing House War Law Service, Vol. 4, under paragraph numbers as indicated in connection with the following citations. A few of the many cases wherein the courts have held consumers' suits brought under section 205(e) to be "remedial" are:

Regan v. Kroger (Ill. Supreme Ct. 3-21-44), 54 N. E. (2d) 210;

Beasley v. Gottlieb (N. J. Supreme Ct. 12-28-43), 35 Atl. (2d) 49;

Silberg v. Klarfield (N. J. Supreme Ct. 5-5-44), 35 Atl. (2d) 221;

Bendit, Pl., and P. Brown, Adm. of OPA, v. HLR Co. (N. J. Supreme Court 1-5-44), 35 Atl. (2d) 53;

Rutkiewicz, Pl. and P. Brown, Adm. of OPA v. Great A. & P. Co. (Wis. Circuit Ct. Milwaukee, 6-9-43), Vol. 4, War Law Service, par. 50,963;

Kelley v. Graham, Def., and L. Henderson, Adm. of OPA (Ore. Circuit Ct., Portland), Vol. 4, War Law Service, par. 51,761;

Kline v. Hargrave, Def. and P. Brown, Adm. of OPA (Ill. Circuit Ct., 7-20-43), Vol. 4, War Law Service, par. 51,787;

Regan v. Kroger (Chicago Municipal Ct.), Vol. 4, War Law Service, par. 50,957;

Bristol v. Sun Stores (Municipal Ct., New York, 4-20-43), Vol. 4, War Law Service, par. 51,075;

Pratt v. Hollenbeck (Penn. Ct. Com. Pleas, 3-1-43), Vol. 4, War Law Service, par. 51,735;

Whatley v. Love (Ct. of Appeals, Parish of Orleans, 5-24-43), Vol. 4, War Law Service, par. 51,754;

Kaplan v. Arkellian (N. J. Dist. Ct., 1943), Vol. 4, War Law Service, par. 51,776;

Bennett v. Ondrus (N. J. Circuit Ct., 7-26-43), Vol. 4, War Law Service, par. 51,797;

Armstrong v. Aldorisio (Conn. Ct. Com. Pleas, 10-28-43), Vol. 4, War Law Service, par. 51,819;

Stofan v. Harisis (Ohio Ct. Com. Pleas, 2-10-44), Vol. 4, War Law Service, par. 51,854.

"Government Suits" Are "Penal."

However, the situation as to suits brought *by the Government* under section 205(e) for recovery of treble the overcharges, fall into an entirely different category; those "government suits" are purely penal in character; and the recovery allowable to the government in such cases is a penalty, pure and simple.

It has long been the settled law that where a statute provides that any person who commits certain acts prohibited by a law shall be liable to the payment of a sum or amount to the state or government, such statute is a penal statute, and the recovery allowable to the state or government thereunder is not by way of compensation (or

remedial) but on the contrary is by way of punishment and is a "penalty."

U. S. v. Child, 266 U. S. 304;
New York v. Jersaurt, 263 U. S. 493;
Schick v. U. S., 195 U. S. 65, 77;
Helwig v. U. S., 188 U. S. 605, 610-613;
Huntington v. Attrill, 146 U. S. 657, 667;
U. S. v. Choteau, 102 U. S. 603, 611.

So, when section 205(e) which purports to render a seller liable to the government for treble the amount of an overcharge made in a private sale to a private person, is tested by the above mentioned rule, it is readily apparent that section 205(e) (in so far as those provisions imposing a money liability to the government are concerned) is a penal statute or section; the money liability imposed upon the seller thereunder is nothing more nor less than punishment for his acts; and the amount recoverable by the government is a "penalty" pure and simple.

The question of the character of section 205(e) in so far as government suits thereunder are concerned, has frequently been before the United States District Courts over the nation, and those courts have held that section 205(e) is "penal"; that the amount recoverable by the Government in such suits is a "penalty"; and that such actions are actions for the recovery or enforcement of the "penalty."

Some of the cases and decisions referred to are:

P. Brown, Administrator, v. Glick Bros. Lumber Co., et al. (U. S. Dist. Ct., So. Dist. Calif., December 2, 1943), 52 Fed. Supp. 913.

In this case, which is the matter now at bar, the District Court in its judgment of dismissal held:

"That the action is penal in nature." [R. 196.]

And in the written opinion of the Court, filed on December 2nd, the Court said [R. 153]:

"The provision permitting the judgment for treble amounts, or $50.00, whichever is greater, is, therefore, penal in nature so far as defendants are concerned."

P. Brown, Administrator, v. Cummins Distilleries Corp. (U. S. Dist. Ct. Western Dist. Kentucky, January 12, 1944), Vol. 4, War Law Service, par. 51,081.

In this case the Court said:

"It (Sec. 205(e)) further provides that if 'the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States.'

The recovery so provided is in its nature a penalty.

'A penalty is a sum of money of which the law exacts payment by way of punishment for the doing of some act that is prohibited, or omitting to do some act that is required to be done,' Corpus Juris—Subject: Fines, forfeitures and penalties, section 72; In re Denver & R. G. W. R. Co., 27 F. Supp. 983, 984. It is essentially different from the idea of damages which is compensation to an injured party for the injury which he has suffered. In a proceeding of this nature, the plaintiff has suffered no damages, and the action is not for the purpose of compensation. Regardless of the language in the statutory provision,

it is the nature of the provision itself that is controlling. The action is essentially one for the recovery of a penalty. Hellwig v. U. S., 188 U. S. 605, 610 through 613; New York v. Jersaurt, 263 U. S. 493; United States v. Child, 266 U. S. 304; Commonwealth v. Farmers Bank & Trust Co., (C. C. A. 6th), decided December 7, 1943."

C. Bowles, Administrator, v. Curtis Candy Co. (U. S. Dict. Ct., Western Dist., Missouri, Jan. 21, 1944), Vol. 4, War Law Service, par. 51,065.

In this case the Court in its opinion said:

"In the motion to dismiss, the defendant challenges the right of the Administrator to sue for the *penalties* prescribed in the statute." (Italics supplied.)

C. Bowles, Administrator, v. Adolph Silverman (U. S. Dist. Ct. So. Dakota, March 9, 1944), Vol. 4, War Law Service, par. 51,118; see page v of appendix.

In this case the Court said:

"It is true that this statute in its nature is a penal statute, at least in so far as the defendant is concerned."

Accordingly, under both the long established rules of law, as well as under the various decisions already rendered by the Federal Courts, in actions brought by the government under said Section 205(e), it is clear, and very definitely settled and established, that Section 205(e) in so far as it purports to render the seller of commodities liable to the government, is penal; and the liability thus imposed is not as "compensation" for any injury, but rather as punishment, and "penalty."

Statutes Which Are Penal in Nature, but Which Are Vague or Uncertain as to the Acts or Standard of Conduct Giving Rise to the Imposition of the Penalty, Are Invalid and Void as in Violation of the Due Process Clause.

The statement of law, as contained in the foregoing heading, is so well settled that extended argument on the point is unnecessary.

Some of the leading cases on the subject are as follows:

Gorin v. U. S., 312 U. S. 19, 85 L. Ed. 488;

U. S. v. Cohen Grocery Co., 255 U. S. 81;

Cline v. Frink Dairy, 274 U. S. 445;

Connally v. General Construction Co., 269 U. S. 385;

Collins v. Kentucky, 234 U. S. 634;

Lanzetta v. New Jersey, 306 U. S. 451;

American Seeding Machine Co. v. Kentucky, 236 U. S. 660;

Weeds v. U. S., 255 U. S. 109;

International Harvester Co. v. Kentucky, 234 U. S. 216;

Tedrow v. Lewis Company, 255 U. S. 98;

Kinnane v. Detroit Creamery Co., 255 U. S. 102.

Existence of State of War Does Not Suspend the Guarantee of Due Process.

That the existence of a state of war does not suspend the guarantees of the Fifth Amendment, nor relieve Congress from the limitations of that amendment, is well settled.

Mr. Chief Justice White, in the opinion in *U. S. v. Cohen Grocery Co., supra,* said:

> "We are of the opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees of the fifth and sixth amendments as to questions such as we are here passing upon. *Ex parte Milligan*, 4 Wall. 2, 121-127; Monongahela Navigation Co. v. U. S., 148 U. S. 312, 336; U. S. v. Joint Traffic Association, 171 U. S. 505, 571; McCray v. U. S., 195 U. S. 27, 61; U. S. v. Cress, 243 U. S. 316, 326; Hamilton v. Kentucky Distilleries, 251 U. S. 146, 156. It follows that, in testing the operation of the Constitution upon the subject here involved the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view."

If that penal provision is so worded that those various United States Judges, after carefully studying and considering the language and the act, arrive at contrary and conflicting understandings as to the meaning of the words, then that language used in the section is obviously vague and uncertain, and in law it *cannot* serve as a legal basis for the imposition of a penalty upon ordinary citizens who presumably, and actually, are less versed in statutory interpretation than are those learned judges. And the Su-

preme Court approved that test when in its decision in *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, at 90, it said:

> "And that this is not a mere abstraction finds abunddant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them is vividly portrayed.
>
> "As illustrative of this situation we append in the margin (see 225 U. S. 90) a statement from one of the briefs on the subject. And again the condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers (doubtless inspired by a zealous effort to discharge their duty) to establish a standard of their own to be used as a basis to render the section possible of execution."

And from the standpoint of conscience and morals, that vague and uncertain language of Section 205(e) *should not be permitted* to serve as a basis for the imposition of a penalty against ordinary citizens who must necessarily guess or surmise, but at their own peril, as to its meaning.

The due process clause was written as a guarantee to lay people, that they should never be called upon to guess or surmise, at their peril; and that acts which provide for the imposition of a penalty must be clear, certain and plainly understandable language, otherwise they are void; and that if Congress enacts any penal statute or section, which is vague or uncertain as to the particular acts, or standard of conduct giving rise to the imposition of the penalty, then Congress has acted beyond, and in excess

of, its constitutional powers, and the fruit of its overreaching action is void.

However, the indisputable fact remains that the United States District Courts at widely separated points over the nation, in cases brought before them under Section 205(e) have arrived at various and wholly conflicting conclusions as to the meaning of the phrase "in the course of trade or business" as used in that section. Some of the cases, in the order of their determination are:

Bowles, Administrator, v. Glick Bros. Lumber Co., 52 Fed. Supp. 913, decided December 2, 1943 by U. S. District Judge Hall of Los Angeles;

Bowles, Administrator, v. Chew, 53 Fed. Supp. 787, decided January 13, 1944 by U. S. District Judge Goodman of San Francisco;

Bowles v. Strickland (D. C. Ga), 55 F. S. 132;

Bowles v. Rock, 55 F. Supp. 865;

Bowles v. Beatrice Creamery Co., 56 Fed. Sup. 805;

Bowles, Administrator, v. Silverman, decided March 9, 1944 by U. S. District Judge Wyman of South Dakota;

Brown, Administrator, v. Molloy, decided March 10, 1944 by U. S. District Judge Welsh of Pennsylvania;

Bowles, Administrator, v. Seminole Rock & Sand Co., decided March 28, 1944 by U. S. District Judge Akerman of Florida;

Bowles, Administrator, v. Denunzio Fruit Co., 55 Fed. Supp. 9 ,decided May 3, 1944 by U. S. District Judge Miller of Kentucky;

Bowles, Administrator, v. Sieffs, decided May 4, 1944 by U. S. District Judge Joyce of Minnesota;

Bowles, Administrator, v. Smith Lumber Co., Action No. 22760-R in the U. S. District Court, San Francisco. Decided on May 29, 1944 by U. S. District Judge Roche. No opinion rendered.

The wide variety of conflicting interpretations put upon the language "for use or consumption other than in the course of trade or business" as used in Section 205(e), by United States District Judges, at widely separated points over the country, demonstrates more clearly and conclusively than any argument that might be presented by us, that that language is vague, indefinite and uncertain; and that it is not merely *capable* of various interpretations, but that judges, long trained and skilled in the interpretation of statutes, after careful study of the language, find themselves in complete disagreement as to the meaning of the phrase.

The various conflicting interpretations of the enlightened United States District Judges in the cases above cited may be briefly stated as follows:

The case of *Prentiss Brown, Administrator, v. Glick Bros. Lumber Co.,* 52 Fed. Supp. 913, was decided by United States District Judge Pierson Hall of Los Angeles, on December 2, 1943, and is the action involved in this appeal. In that case Judge Hall announced his understanding and interpretation of Section 205(e) as authorizing "government suit" *only* when the overceiling sale was made by a "bootlegger or black market operator"; but in all cases where the sale was made by anyone

regularly engaged in the business of dealing in the particular commodity, either as a producer, wholesaler, or retailer, the exclusive right to sue is vested in the purchaser.

The case of *Chester Bowles, Administrator, v. Chew*, 53 Fed. Supp. 787, was decided by U. S. District Judge Goodman of San Francisco, on January 13. 1944. The *Chew* case, like the *Glick* case, involved sales of lumber; and Judge Goodman commented upon and disagreed with Judge Hall's understanding and interpretation of Section 205(e). Judge Goodman stated his understanding and interpretation of "for use or consumption in the course of trade or business" to be and mean a purchase by a dealer or middleman for resale; that "merchants engaged in business buying and selling between themselves, were not given the right to sue," and that in such cases the liability of the seller is to the Government. Although Judge Goodman does not *expressly* so state, it would seem from his decision that he understands that a purchase from a retailer, by a private person, not a dealer or middleman in the commodity involved in the sale, would constitute a purchase "for use or consumption *other* than in the course of trade or business."

The case of *Chester Bowles, Administrator, v. Silverman*, was decided by U. S. District Judge Wyman of South Dakota on March 9, 1944. In the *Silverman* case, Judge Wyman held that where various farmers purchased farm machines (combines) from a local machinery dealer, for use on their respective farms, such purchases were made "for use or consumption *in* the course of trade or business" (to-wit: the farming business); and that under Section 205(e), which the Court held to be a penal sec-

tion, the exclusive right to sue and recover the penalty, was vested in the Government.

The case of *Prentiss Brown, Administrator, v. Molloy* was decided by U. S. District Judge Welsh, of the Eastern District of Pennsylvania on March 10, 1944. In the *Molloy* case Judge Welch held that where various farmers purchased farm machines, for use on their respective farms, such purchases were made "for use or consumption *other* than in the course of trade or business," and that therefore under Section 205(e) the exclusive right to sue is vested in the farmers, not in the Government. It will be noted that Judge Welsh's understanding and interpretation of "for use or consumption in the course of trade or business" is directly contrary to the understanding and interpretation of Judge Wyman in the *Silverman* case.

In his decision Judge Welsh discusses the decision in the *Silverman* case, and in disagreeing with that interpretation he pointed out its lack of logic in the following language:

> "There would seem to be no logical reason for restricting the privilege to only those persons who buy articles for uses not in any way connected with their trade or business. Such interpretation would mean that a purchaser of a tractor for use on his farm would not be entitled to the redress provided, but a purchaser who bought the same kind of appliance for use in the cultivation of his private estate not maintained as a business would have the right to recover treble the overcharge."

The case of *Chester Bowles, Administrator, v. Seminole Rock & Sand Co.*, was decided by U. S. District Judge Akerman of Florida, on March 28, 1944. In

this *Seminole* case Judge Akerman held that where the defendant Rock and Sand Company sold ballast to a railroad company for use by it in its business, in ballasting its roadbeds, the sale is to a consumer, rather than a middleman, and the purchase was made "for use or consumption *other* than in the course of trade or business"; consequently no Government suit can be maintained because the exclusive right to sue is vested in the purchaser. And Judge Akerman, in interpreting Section 205(e) held that "it makes no difference whether an ultimate consumer is the housewife purchasing a can of soup or a railroad purchasing a hundred thousand dollar diesel engine" for use in its business, it is nevertheless a purchase by an ultimate consumer and therefore "for use or consumption *other* than in the course of trade or business."

In other words, a purchase of any commodity by an ultimate consumer of the goods, is a purchase "for use or consumption *other* than in the course of trade or business." It will be noted that Judge Akerman's understanding and interpretation of the phrase in question is exactly opposite to the understanding and interpretation of Judge Wyman in the *Silverman* case.

The case of *Chester Bowles, Administrator, v. Denunzio Fruit Co.*, was decided by U. S. District Judge Miller of Kentucky on May 3, 1944. In this case Judge Miller in interpreting Section 205(e) held that where a retailer sells to a purchaser for his own use or consumption, such purchase is "for use or consumption *other* than in the course of trade or business" and only the purchaser may sue; but where a wholesaler sells to a retailer, the purchase is made "for use or consumption *in* the course of

trade or business," and in such latter event the exclusive right to sue is vested in the Government.

The case of *Chester Bowles, Administrator, v. Sieffs*, was decided by U. S. District Judge Joyce, of Minnesota, on May 4, 1944. In this case, Judge Joyce, in interpreting Section 205(e), held that if the purchaser bought the commodity to be used in any manner in connection with his (the purchaser's) business, regardless of what that business may be, the purchase is made "for use or consumption *in* the course of trade or business," and under Section 205(e) the exclusive right to sue is vested in the Government. In other words, Judge Joyce's understanding and interpretation of the phrase "in the course of trade or business" is virtually the same as is that of Judge Wyman in the *Silverman* case, but is in violent conflict and disagreement with the understandings and interpretations of Judge Welsh in the *Molloy* case, Judge Akerman in the *Seminole* case and Judge Miller in the *Denunzio* case.

The case of *Chester Bowles, Administrator, v. Smith Lumber Co.* was before Judge Michael Roche of San Francisco, on May 29, 1944. (No. 22,760-R.) In this *Smith* case, the Government sued for money under Section 205(e). A motion to dismiss was filed. The record on the motion to dismiss established clearly that the defendant was a retail dealer in lumber, and that the sales involved were all at retail, to consumers who purchased not for resale, but for their own use and consumption. Judge Roche overruled the motion to dismiss, but rendered no opinion, either oral or written. However, in the light of the motion and the record on that motion, Judge Roche's ruling is that where persons purchase lumber

from a retail dealer, for their own use or consumption, and not for resale, such purchases are "for use or consumption *in* the course of trade or business" within his understanding and interpretation of Section 205(e) and therefore, the Government is vested with the exclusive right to sue. Although the views of the various other U. S. District Judges over the country were and are at wide variance and disagreement as to the meaning of "for use or consumption in the course of trade or business," none of those courts understand or interpret the section as Judge Roche views and understands it. Judge Roche has an understanding and interpretation of "in the course of trade or business" which is different from that of *all* the other courts and judges.

We therefore respectfully submit that the various U. S. District Judges who rendered the decisions in the eight cases above mentioned were, and are, in hopless and irreconcilable conflict and disagreement as to the meaning of the phrase, "for use or consumption other than in the course of trade or business." Nothing could more clearly and conclusively demonstrate and establish the uncertainty and indefiniteness of the language in question than the fact that those judges, all of them most sincere and conscientious in their attempt to understand and interpret the language in question, arrived at such wholly different and conflicting conclusions as to the meaning of the language.

And when the courts and judges, as between themselves cannot, and do not, agree upon the meaning of the language "for use or consumption in the course of trade or business," we submit that the language is too vague

and uncertain to be understood by an ordinary lay person, or to operate as a legal basis for the imposition of a penalty against any lay person who "guesses wrong" as to the meaning which may be ultimately attributed to the language by the courts of last resort.

Accordingly, it is apparent from a mere reading and study of the language of Section 205(e), and particularly the words "for use or consumption in the course of trade or business," that the section is vague and uncertain as to the particular act or standard of conduct which will impose upon a seller a liability to the Government for the penalty provided in the section.

And the fact that in this particular case now at bar the views of the Government and the defendants and the judge below were all at sixes and sevens, and were in direct conflict with each other as to the meaning of the language in question, most convincingly indicates the vagary and uncertainty of the language.

And when we review the various and conflicting interpretations given the language by United States District Judges at widely separated points over the country, that, by rule of common sense as well as according to the test approved by the United States Supreme Court in *U. S. v. Cohen Grocery Co.* (quoted at pages 93-94, *ante*), is proof conclusive of the vagary and uncertainty of the meaning of the language "in the course of trade or business" as used in Section 205(e).

Section 205(e) Being Penal, Yet Being Vague and Uncertain as to the Acts or Standard of Conduct Which Result in the Imposition of the Penalty in Favor of the Government, Is Invalid and Void Because in Violation of, and Repugnant to the Due Process Provisions of the Fifth Amendment.

In the preceding sections of this brief (pages 83-94, *ante*) we have shown that Section 205(e), in so far as it renders a seller liable to the Government for treble the overcharge, is a penal section, and the amount recoverable by the Government is a "penalty," pure and simple.

And at pages 83-94, *ante,* we have shown at considerable length, that the language "for use or consumption other than in the course of trade or business" is actually vague, indefinite and uncertain.

At pages 83-94, *ante,* we have presented the law, as set forth in the decisions of the Supreme Court of the United States, wherein it is definitely and conclusively settled that where a penal statute or section is vague or uncertain as to the acts or conduct giving rise to the imposition of the penalty, such penal section or provision is invalid and void because in violation of the due process clause.

Consequently, Section 205(e) in so far as it attempts or purports to render a seller liable to the Government for treble the amount of the overcharge, is invalid and void because in violation of and repugnant to the due process clause.

Comments on the Judgment of the District Court.

It will be borne in mind that under the express provisions of Section 205(e) the Government may maintain an action *only* in cases where the buyer is "not entitled to bring suit or action." Consequently, the fact that the overcharged purchaser or purchasers were "not entitled to sue" was a condition precedent to any right on the part of the Government to bring or maintain suit in the case at bar; and no complaint of the Government could state a claim or cause unless it contained alleged facts showing the existence of the condition precedent.

In its complaint filed in the court below [R. 2], the Government, after accusing defendants of making sales of lumber at overceiling prices (the identity of the purchasers being undisclosed), then sought to plead its right to bring and maintain the suit, by including in its complaint the following allegation:

> "None of said purchases was made for use or consumption other than in the course of trade or business."

No other allegation is included in the complaint as a basis for any right on the part of the Government to bring or maintain the suit. And it will be observed that the above quoted allegation from the complaint was in the exact words of the statute (Sec. 205(e)), which provides that overcharged buyers (not the Government) have the exclusive right to bring suit when the purchase was made "for use or consumption *other* than in the course of trade or business."

As a ground of their motion to dismiss the complaint, defendants below asserted:

> "That Subsection (e) of said Section 205 of the Emergency Price Control Act of 1942 is unconstitutional and void and in violation of the Fifth Amendment to the Constitution of the United States."

In the court below, extended hearings of the matter were had, which were devoted principally to arguments and discussions as to the meaning of the words "for use or consumption other than in the course of trade or business," and the consequent right, or lack of right, of the Government to bring and maintain the action.

After those extended hearings were completed and Judge Hall had given careful thought and consideration to the matter, he rendered his considered opinion [R. 162] which he devoted principally to a discussion as to his understanding of the vague and uncertain phrase, "in the course of trade or business." And in the judgment rendered by him, he declared and adjudged [R. 197]:

> "That the nature of the action against defendants is penal; and the complaint is so vague, indefinite and uncertain as to fail to inform the defendants of the ground for claiming a penalty on any of the acts and facts constituting the basis of the Government's claim."

Of course, when Judge Hall determined, as he did, that the language "for use or consumption other than in the course of trade or business," as used in the complaint, was "vague, indefinite and uncertain," he necessarily determined that that identical language used in Section 205(e) was and is "vague, indefinite and uncertain."

Judge Hall therefore determined and adjudged:

(a) That the action is penal; and

(b) That the words "for use or consumption other than in the course of trade or business" are vague, indefinite and uncertain.

And having thus concluded, it was incumbent upon Judge Hall to apply the well settled applicable law, and declare Section 205(e) to be invalid, unconstitutional and void because in violation of the provisions of the due process clause.

However, Judge Hall, as is so apparent from his opinion, was most anxious to sustain the act itself, if possible; and in his zeal to sustain the section he held [R. 197]:

> "That Section 205(e) of the Emergency Price Control Act of 1942 is constitutional, but the attempted application by the plaintiff in this case is in violation of said act."

And he then proceeded to state his understanding and interpretation of "in the course of trade or business" as authorizing Government suits only in those cases where the overceiling sales were made by "bootleggers" or "black market operators."

Quite obviously, Judge Hall's judgment is inconsistent in its component parts. If, as he quite properly concluded, (1) Section 205(e) is penal, and (2) the phrase, "in the course of trade or business" is vague, indefinite and uncertain, then Section 205(e), in so far as its penalty (Government suit) provisions are concerned, is invalid and void; and his conclusion that "Section 205(e) is constitutional" is necessarily both inconsistent and erroneous in so far as it holds the *penal* provisions of Section 205(e) to be valid and constitutional.

His action in dismissing the complaint was a correct and proper action; but under his findings above indicated, he should have declared Section 205(e) to be *unconstitutional* in so far as "Government suits" thereunder are concerned.

The case at bar is not the first instance of intrusion of the legislative department upon the constitutional right of the citizen to due process. There have been innumerable such instances in the past as is so evident from the past judicial decisions declaring various acts to be void. During World War I, Congress, desiring to avoid inflation by control of the prices of necessities, passed the Lever Act. That Act was subsequently declared unconstitutional and void by the Supreme Court because of the very same infirmities and faults that afflict the penalty provisions (government suit provisions) of the present Emergency Price Control Act, to-wit: It was penal in nature, yet was vague and uncertain as to the particular acts or standard of conduct which would result in the liability for the penalty.

U. S. v. Cohen Grocery Co., 255 U. S. 81;
Weeds v. U. S., 255 U. S. 109;
Tedrow v. A. T. Lewis Co., 255 U. S. 98;
Kinnane v. Detroit Creamery Co., 255 U. S. 102.

And in its decisions in the above cited cases, the Supreme Court made it very plain and clear that the existence of a state of war does not suspend the due process clauses of any other guarantee of either the Fifth or Sixth Amendments, or relieve Congress from their limitations.

VI.

Indefiniteness of Complaint Is Ground for Dismissal Where No Case Is Stated.

This Court erred in holding that "indefiniteness of the complaint is not a ground for dismissal." This holding is so far reaching that it would justify a complaint that John Doe sues James Brown for damages. Thus the Court would say that a complaint that contained merely the names of the parties and little or nothing more is not a ground for the dismissal of the complaint, even though the complaint is for a penalty though civil in nature.

We respectfully submit that the rules of civil procedure were not meant to supplant the constitutional guaranty and that sheer bald conclusions with nothing more in a civil case would be sufficient to state a claim or claims for which relief could be had. If the suit were for a series of promissory notes, would this Court be willing to say that one could sue for all of the notes in a combined suit without setting up the facts as to each note so that the Court, as well as the defendant, might know on what the suit is predicated? Is not the case at bar much stronger where the claim is for a penalty of forfeiture, which the law says must be strictly construed and in which separate claims exist for alleged claims of violations of the statute? While it is true that under Rule 12B of the Federal Rules of Civil Procedure a motion for a more definite statement or for a bill of particulars will lie, nevertheless this must be read in connection with other rules, even under the Rules of Civil Procedure which provide that facts must be stated which show a valid claim on its face. Under Rule 9 fraud, mistake, a condition of the mind must be stated with particularity. Also conditions precedent must be pleaded. While the new rules of Civil Procedure do

not govern all possible situations and since the Emergency Price Control Act was passed subsequent to the new rules having gone into effect and is itself rather unusual legislation, it can not be said that the rules themselves are exclusive and exclude even constitutional guarantees regarding the form and manner of pleading cases. Thus, in *Fleming v. Dierks Lumber and Coal Company*, 39 Fed. Supp. 237, the Court said:

> "I am of the opinion that the framers of the rules did not intend to permit a plaintiff to subject the defendant to the various processes of the court without first stating definite facts upon which a judgment might be based. . . .
>
> I do not think that rules 26-37 relating to depositions and discovery should supplant the requirement of pleadings sufficiently advising a defendant of the nature of the claim and enabling him to prepare his responsive pleading and generally prepare for trial. . . .
>
> A 'short and plain statement' must be reasonably definite or it will not be plain. A speedy, just and inexpensive trial cannot be had merely upon the filing of a notice of claim and then resorting to the expensive and indefinite procedure of discovery and depositions."

In *United States v. Johnson*, 53 Fed. Supp. 167, the Court held with reference to an indictment in an O. P. A. case:

> "Sufficient facts of a crime committed must be stated in an indictment to support a conviction. Specifically, the court and defendants must be able to determine this from the indictment, the statutes and the pertinent administrative regulations passed pur-

suant to the statutes. If the facts alleged may all be true and yet appear to constitute no offense, the indictment is insufficient. . . .

"The purpose of such requirements is to give a defendant the fair opportunity to prepare his defense and enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime. . . .

"It is impossible to glean from the allegations of each indictment, the Act, and the regulations what, in fact the ceiling price was for the commodity, notwithstanding that the prices mentioned in the indictments are the ceiling prices or are below the ceiling prices. Since the Act and the regulation do not establish any specific ceiling price for the commodity *sub judice*, defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner in which it arrived at this conclusion. It may be that the government's method of calculation is erroneous. If so, defendants should have the opportunity to challenge this defect if, in fact, it exists."

Judged by these standards, nothing is set out in the complaint that gives the Court or defendant fair notice of the case, nor does it give the Court or defendant an opportunity to determine whether a claim is stated. As this is a penal statute it should be strictly construed in the light of a penalty and as time and place are material elements in considering whether a complaint states jurisdictional facts (Rule 9(f), Rules of Civil Procedure), it is respectfully submitted that the complaint states insufficient jurisdictional facts.

In prescribing rules of procedure in civil actions, not even the Supreme Court of the United States may "mod-

ify, abridge, or enlarge the substantive rights of litigants under the Constitution of the United States or enlarge or diminish the jurisdiction of the Federal courts."

United States v. Sherwood, 312 U. S. 584, 85 L. Ed. 1058;

Shibbach v. Wilson, 312 U. S. 1, 85 L. Ed. 479.

The judgment of the Circuit Court attempts to "modify and abridge" the substantive rights of the appellees under the Constitution of the United States, to-wit, to be informed in a penal action of the nature and cause of the accusation with such particularity that even though the action is civil in form but penal in nature, it will inform the accused of what he has to meet so that both the Court, as well as all the parties, may be able to determine from the face of the pleadings whether there has been stated a claim for which relief can be had. Otherwise, an accused from whom the Government is seeking a penalty will be put to a long and expensive trial and expensive proceedings.

One of the constitutional rights which we think still is existent in the United States is the right not to be put to the expense of a trial if the complainant has no cause of action. If the action was criminal in form, a demurrer would lie. A motion to quash the indictment would lie, but being civil in form but penal in its effect, this Court has said that the same remedies do not exist, and that the accused must be required to answer and stand trial.

Under the Rules of Civil Procedure, the Court must act upon the claim for relief within twenty (20) days and any ruling upon the claim similar to the ruling on a demurrer places the case in the form where issue must be joined and the case set for trial.

See:

U. S. v. Solomon, 3 F. R. D. 411.

The court in that case held as follows:

"Rule 81 which relates to the general applicability of the Rules does not exclude civil suits for penalties though it does, in a limited measure, exclude 'forfeiture of property for violation of a statute of the United States' from their applicability. When Rule 1 is considered the question immediately arises as to whether a suit for a penalty or a forfeiture imposed as punishment for violation of a statutory inhibition as opposed to compensation for damages can be considered to be within the Rules regardless of Rule 81. Rule 1 reads: 'These rules govern the procedure in the district courts of the United States in all suits of a civil nature . . . with the exceptions stated in Rule 81.'

"In the case of Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, the court said, 'We are also clearly of opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.' Page 634 of 116 U. S., page 534 of 6 S. Ct. Again the court said on the same pages, 'As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that part of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.'"

VII.

The Circuit Court Erred in Holding That the Administrator Was Entitled to Maintain the Suit.

This Court, contrary to the holding of the District Court, says that Section 205(e) of the 1942 Act is to be read in conjunction with Section 4(a). The Court says that

> "The buyer in the course of trade or business is deemed by the statute to be *in pari delicto* with the seller, but one who buys for use or consumption other than in the course of trade or business—the ordinary commercial consumer—is not declared a violator. He is apparently thought to possess no choice in the matter."

There is nothing in the statute which justifies this conclusion nor is there anything in the Congressional history of the statute that justifies this conclusion. There is no reason to assume that a buyer who is willing to go into a store and pay 50 cents or $1.00 over the ceiling price in order to obtain a carton of cigarets or a bottle of whisky or gasoline is not as much *in pari delicto* as the seller, and we do not think that Congress thought so either but it was for the purpose of stamping out the black market operations and to give an incentive to doing so that Congress provided for suits by the non-commercial consumers for treble the damages.

And in the same incentive for revelation exists in the case of persons who buy in the course of business or trade as those who buy for individual use. Apparently neither

have any choice in the matter if they are to get the supplies which they are seeking. The butcher who must go to the wholesaler and wants rare meats which he wishes to purchase in lieu of having his competitor get them is equally affected.

The District Court, therefore, erred in holding that "in all other cases the right vests in the Administrator for the use and benefit of the nation as a whole."

The right of the Administrator to sue was not contained in any original legislative enactment. It was inserted in the last draft of the bill before it went to Congress and probably did not receive the inspection and scrutiny which Congress would have given to it had it not come in at the 11th hour. The right of the Administrator to sue is only essential in the event that no other remedy is existent and the purpose of the right is not supported by anything in the Congressional history of the Act.

It was error for this Court to rule on the suppression of the evidence, in view of the fact that the Court reversed the order dismissing the complaint. Under such circumstances, the order suppressing the evidence became an interlocutory order which was within the exclusive jurisdiction of the trial court, and the trial court should not be limited for further consideration of the motion. This Court has so held where this Court declined to consider an interlocutory order to suppress the evidence. (*Rosenwasser v. U. S.*, 145 F.(2d) 1015 (Ninth Circuit).)

The Circuit Court erred in its decision on the order suppressing the evidence. The Circuit Court has construed the evidence with relation to the motion to suppress the evidence, in direct conflict with the finding of the trial judge. It has always been heretofore held that the order suppressing the evidence was a function of the trial judge, and if it was supported by substantial evidence that the order would be sustained. (*Weeks v. U. S.* 232 U. S. 383, 58 L. Ed. 652; *Gouled v. U. S.*, 255 U. S. 298, 65 L. Ed. 647). This Court, however, has substituted itself for the trial court in construing the evidence but has not found that the trial court's findings were not supported, but ample and sufficient evidence.

VIII.

The Motion to Suppress Was Interlocutory and Therefore Should Not Have Been Reversed.

The Circuit Court erred in respect to the motion to suppress the evidence in that having reversed the order of dismissal there was no jurisdiction for this court to consider this interlocutory order and the decision of this court in effect precludes the trial court from reconsidering the motion with all the evidence before it. The trial court should have that jurisdiction, and this court was without jurisdiction to rule on the interlocutory order. Title 28, Section 225, does not give the Circuit Court jurisdiction to rule on interlocutory orders.

Cobbledick v. U. S., 309 U. S. 323.

IX.

The Emergency Price Control Act Was Not Designed as a Means of Providing the Administrator or His Agents the Right to Demand Money Under Threats. The Act Only Authorizes Actions for Damages When and If the Administrator Is the Proper Party to Bring the Action and to Collect the Same Only When and If Lawfully Proved.

Under cover of authority, Agents and Officers of the Office of Price Administration made demands for various sums of money prior to any action being filed in this case, which demands ranged from $14,000.00 to $90,000.00. [R. 26, 45, 53, 59, 82, 87, 106, 107, 118, 121, 145, 147.]

Investigators and agents of the Office of Price Administration admitted that they were showing a photostated copy of an invoice (clandestinely photostated after being sneaked out of the defendants' place of business) for the purpose of negotiating a settlement for $25000.00. [R. 43, 45.]

The Ninth Circuit Court thought there was nothing wrong with this. We respectfully submit that the Act does not authorize such claims nor such procedure. In the case of *Bowles v. Paila*, 56 Fed. Supp. 453-454, Judge Leibell said:

> "(2, 3) A defendant who violates the regulations set up pursuant to the Emergency Price Control Act, 50 U. S. C. A. Appendix, Sec. 901 *et seq.*, is subject to criminal prosecution, and also to an action for $50.00 or treble the amount of the excess charge in a suit by a person overcharged. No one can deprive the injured party of that right against the defendant. Yet under the terms of the proposed decree the 'vol-

untary' payment to the United States Treasurer 'shall be in lieu of the requirement herein of refund of said excess rent to tenants by defendants.' In my opinion this practice for so-called 'voluntary' payments to the United States Treasurer in cases of this kind is not authorized by the statute. No sanction for it should be embodied in a decree of this Court, even on consent. The Act itself contains all the remedies made available by the Congress and this is not one of them. Chapter 26, Title II, Sec. 205, 56 Stat. 33, Title 50 U. S. C. A. Appendix, Sec. 925."

X.

The Amendment to the Statute Terminates the Action as Filed Since the Filing of the Complaint.

1. Congress has amended the Emergency Price Control Act and has changed the right of a cause of action in many respects and has further implemented the right of the people with the constitutional guarantees of being able to be represented at any hearing by counsel and to have the testimony taken down.

2. No right of action exists for more than single "damages" or single the amount of the alleged overcharge unless the acts done are "wilful" or the result of failure to take practicable precautions against the occurrence.

3. Several courts have rendered different opinions attempting to construe the meaning of the words giving rise to a claim for which relief could be granted "other than in the course of business or trade" and also the meaning of the expression "in the course of business or trade."

4. A motion to discuss the action was filed in the Circuit Court and denied.

The Emergency Price Control Act of 1942 as originally enacted provided the following in Section 205(e):

> "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommoditions shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this act."

This Act was Public Law No. 421, 77th Congress, Chapter 26, Second Session (H. R. 590).

Section 1(b) of Title I of the Act provides as follows:

> "The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1944, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses

of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

These sections were amended by the Stabilization Act of October 2, 1942, Public Law 729, 77th Congress, Chapter 578, Second Session (H. R. 7565), which contained a saving clause as follows:

"Sec. 6. The provisions of this Act (except sections 8 and 9), and all regulations thereunder, shall terminate on June 30, 1944, or on such earlier date as the Congress by concurrent resolution, or the President by proclamation, may prescribe."

The Stabilization Extension Act of 1944, Chapter 325, page 383 (S. 1764) amended the Emergency Price Control Act of 1942 and provided therein as follows:

"(b) Section 202 of the Emergency Price Control Act of 1942, as amended, is amended by adding at the end thereof the following new subsection:

'(1) Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel.'"

Sub-section (e) is amended as follows:

"(b) Subsection (e) of section 205 of the Emergency Price Control Act of 1942, as amended, is amended to read as follows:

'(e) If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determined: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is in-

stituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.'

"(c) The amendment made by subsection (b), in so far as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter."

It is respectfully submitted that the changes in the section have so changed the right of the Administrator that no cause of action has now been stated under any circumstances.

The statute under which the action was brought and under which the complaint was drawn was 56 Statute 23, enacted January 30, 1942, Public Law 421—77th Congress. [R. 2.]

This law expired June 30, 1944. No saving clause was contained in the Stabilization Extension Act of 1944 and Section 205(e) was amended to change the applicable

provisions and circumstances under which an action could be brought. An action for treble damages does not lie under the statute as amended and under the complaint as alleged and the claim alleged therein.

No jurisdiction exists under the amended statute where there is no wilfullness.

The failure of the statute clearly to define who is or is not a buyer in the course of trade or business is a jurisdictional defect.

United States v. 11150 Pounds of Butter, 195 Fed. 657, and cases therein cited at page 663;

Todd v. United States, 158 U. S. 282, 39 L. Ed. 982;

Davies Warehouse v. Bowles, 88 L. Ed. 379.

Conclusion.

In time of War, where this Court is fighting to uphold the constitutional guarantees and the Bill of Rights, correct interpretation of the issues involved here are essential to the preservation of liberty. The judgment of the Circuit Court should be reversed and the Judgment of the District Court affirmed, as this would be an outstanding case to exemplify that we still believe in the principles enumerated by our Constitution in War as well as peace.

Respectfully submitted,

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